Office Supreme Court, U.S.
FILED
DEC 31 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 799

RICHARD K. GORDON *et al.*,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PAUL T. SMITH
MANUEL KATZ
DANIEL KLUBOCK
209 Washington Street
Boston 8, Massachusetts
Attorneys for Petitioners

Blanchard Press, Inc., Boston, Mass. — Law Printers

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statutes Involved	4
Statement of the Case	4
Reasons for Granting the Writ	20
I. The Petitioners' Rights To Due Process Of Law Under The Fourteenth Amendment Were Denied Because The Commonwealth Did Not Ensure That The Grand Jury That Indicted Them Was Free From Bias And Prejudice When There Had Been Substantial Prejudicial Pre-Indictment Publicity In Large Part Stimulated By Officials Of The Commonwealth	20
II. The Petitioners' Rights To Due Process Of Law Under The Fourteenth Amendment Were Denied Because The Trial Judge Did Not Ensure That The Petit Jury Was Free From Bias And Prejudice When There Had Been Substantial Prejudicial Pre-Indictment Publicity In Large Part Stimulated By Officials Of The Commonwealth	28
III. It Was A Violation Of The Constitution Of The United States For The Commonwealth To Convict Petitioners For Larceny When The Evidence Showed That The Larceny Was Committed Outside The Territorial Boundaries Of The Commonwealth, Within The Jurisdiction Of The State Of New York	33
IV. It Was A Violation Of Petitioners' Constitutional Rights For The Court Below To Uphold Their Conviction By Overruling A Long-Established Rule Of Law	38

Page

V. The Court Below Violated Petitioners' Rights Under The *Ex Post Facto* Clause Of The Constitution And Their Constitutional Rights To Due Process Of Law By Affirming Their Convictions When There Was Insufficient Evidence To Prove The Charges Against Them 40

Conclusion 49

Appendix A, Opinion of Court Below Separately Bound

Appendix B, Constitutional Provisions Involved 50

Appendix C, Statutes Involved 51

Appendix D, How Other States Provide A Defendant With The Opportunity To Prove Prejudice On The Part Of Jurors 62

Appendix E, Petition For Rehearing 74

Appendix F, Judgment of the Court Below 79

Table of Citations

Cases

Aldridge v. *United States*, 283 U.S. 308 ..... 30, 32

Associates Discount Corporation v. *C. E. Fay Co.*, 307 Mass. 577 45

Attorney General v. *Pelletier*, 240 Mass. 264 ..... 23, 27

Bain, Ex parte, 121 U.S. 1 27

Ballow v. *State*, 42 Tex. Cr. 261 ..... 35, 36

Beck v. *Washington*, 369 U.S. 541 ..... 20, 26

Beazell v. *State of Ohio*, 269 U.S. 167 39

Blake v. *State*, 54 Okla. Cr. 62 27

Bouie v. *City of Columbia*, 378 U.S. 347 ..... 39, 48

Burns v. *State of Ohio*, 360 U.S. 252 22

Burton v. *United States*, 196 U.S. 283 35

Calder v. *Bull*, 3 Dall. 386 38

Cassell v. *State of Texas*, 339 U.S. 282 ..... 22, 23, 25, 26

Chavez v. *United States*, 258 F.2d 816 30

Commonwealth v. *Anderson*, 245 Mass. 187 46

Page

Commonwealth v. *Andrews*, 2 Mass. 14 34, 36
Commonwealth v. *Beaman*, 8 Gray 497 35, 36, 37, 38, 39
Commonwealth v. *Binkiewicz*, 342 Mass. 740 46
Commonwealth v. *Call*, 21 Pick. 515 (Mass.) 43
Commonwealth v. *Cataldo*, 326 Mass. 377 46
Commonwealth v. *Conlin*, 188 Mass. 282 46
Commonwealth v. *Conroy*, 333 Mass. 755 46
Commonwealth v. *Cummings*, 3 Cush. (57 Mass.) 212 38
Commonwealth v. *Di Stasio*, 294 Mass. 273 29
Commonwealth v. *Fitzgerald*, 164 Mass. 587 48
Commonwealth v. *Friedman*, 188 Mass. 308 34, 37, 38, 39
Commonwealth v. *Geagan*, 339 Mass. 487 21
Commonwealth v. *Green*, 326 Mass. 344 42
Commonwealth v. *Harley*, 7 Metc. 462 42
Commonwealth v. *Holder*, 9 Gray 7 (Mass.) 36
Commonwealth v. *Johnson*, 199 Mass. 62 46
Commonwealth v. *Lawless*, 103 Mass. 425 46
Commonwealth v. *Mannos*, 311 Mass. 94 42
Commonwealth v. *McDonald*, 187 Mass. 581 47
Commonwealth v. *Morse*, 14 Mass. 216 45
Commonwealth v. *Mulrey*, 170 Mass. 103 43
Commonwealth v. *Orler*, 252 Mass. 55 42
Commonwealth v. *Tilley*, 306 Mass. 402 46
Commonwealth v. *Tivnon*, 8 Gray 375 (Mass.) 46
Commonwealth v. *Uprichard*, 3 Gray 434 (Mass.) 35, 36
Commonwealth v. *Welch*, 345 Mass. 366 35
Commonwealth v. *Woodward*, 157 Mass. 516 20
Cook v. *United States*, 138 U.S. 157 39
Costello v. *United States*, 350 U.S. 359 24, 26, 27
DeGolyer v. *Commonwealth*, 314 Mass. 626 23, 27
Delaney v. *United States*, 199 F.2d 107 30
Dennis v. *United States*, 399 U.S. 162 32
Douglas v. *Green*, 363 U.S. 192 22
Eskridge v. *Washington State Board of Prison Terms And Paroles*, 357 U.S. 214 22

Page

Eubanks v. *State of Louisiana*, 356 U.S. 584 22
Farrington v. *Edgerley*, 13 Allen 453 45
Fields v. *City of Fairfield*, 375 U.S. 248 ..... 42, 44, 48
Frank v. *Mangum*, 237 U.S. 309 22
Frasier v. *United States*, 267 F.2d 62 30
Garner v. *Louisiana*, 368 U.S. 157 ..... 42, 44, 48
Geagan v. *Gavin*, 292 F.2d 244 21
Grant v. *State*, 42 Tex. Cr. 273 ..... 35, 36
Griffin v. *People of the State of Illinois*, 351 U.S. 12 22
Gut v. *State of Minnesota*, 9 Wall. 37 39
Guttentag v. *Huntley*, 245 Mass. 212 45
Hammers v. *State*, 337 P. 2d 1097 (Okla.) 27
Harding v. *Eldridge*, 186 Mass. 39 45
Hill v. *State of Texas*, 316 U.S. 400 22
Holt v. *United States*, 218 U.S. 245 30
Home Insurance Co. v. *Dick*, 281 U.S. 397 36
Hurtado v. *State of California*, 110 U.S. 516 21
Irvin v. *Dowd*, 366 U.S. 717 ..... 31, 32
Jones v. *Robbins*, 74 Mass. (8 Gray) 329 ..... 23, 27
Juelich v. *United States*, 214 F.2d 950 30
Kennedy v. *Walker*, 337 U.S. 901 21
Ladd v. *North*, 2 Mass. 513 45
Lawn v. *United States*, 355 U.S. 339 24
Magaw v. *Beals*, 272 Mass. 334 45
Magnolia Petroleum Co. v. *Hunt*, 320 U.S. 430 36
Malinski v. *People of State of New York*, 324 U.S. 401 25
McArthur Co. v. *Beals*, 243 Mass. 449 45
Merchants' National Bank v. *State Bank*, 10 Wall. 604 47
Michel v. *State of Louisiana*, 350 U.S. 91 ..... 22, 24, 25, 26
Michigan State Bank v. *Gardner*, 15 Gray 362 (Mass.) 45
Mills v. *Sullivan*, 222 Mass. 587 45
Morford v. *United States*, 339 U.S. 258 ..... 30, 33
Nash v. *Lang*, 268 Mass. 407 45
New England Box Co. v. *C. & R. Constr. Co.*, 313 Mass. 696 46

Page

New York Life Ins. Co. v. *Head*, 234 U.S. 149 36
Paschen v. *United States*, 70 F.2d 491 30
Pierre v. *State of Louisiana*, 306 U.S. 354 ..... 22, 23
Rainwater v. *State*, 155 Miss. 684 ..... 35, 36
Reece v. *State of Georgia*, 350 U.S. 85 22
Reynolds v. *United States*, 98 U.S. 145 30
Sellers v. *United States*, 271 F.2d 475 30
Spells v. *United States*, 263 F.2d 609 30
State v. *Crowder*, 193 N.C. 130 27
State v. *Hedrick*, 272 Mo. 502 ..... 35, 36
State v. *Polzin*, 197 Wash. 612 47
Stirone v. *United States*, 361 U.S. 212 26
Thompson v. *Dolliver*, 132 Mass. 103 45
Thompson v. *Louisville*, 362 U.S. 199 ..... 42, 44, 48
United States v. *Clancy*, 276 F.2d 617 30
United States ex rel Darcy v. *Handy*, 351 U.S. 454 30
Wagner v. *United States*, 264 F. 2d 524 30
Williams v. *State*, 188 Ind. 283 27
Wright v. *Paine*, 62 Ala. 340 47

Constitutional Provisions

United States:
Article I, section 10, clause 1 ..... 3, 37, 38, 39, 40, 41, 43, 48
Article IV, section 2, clause 36, 37
Fifth Amendment 24, 25
Fourteenth Amendment 2, 3, 6, 7, 20, 21, 22, 25, 26, 28, 33, 40, 42, 44, 48
Massachusetts:
Declaration of Rights, Article XII 7, 23

Statutes

United States:
28 U.S.C. s. 1257 (3) 2
Federal Rules of Criminal Procedure,
Rule 24 (a) 29

Page

Massachusetts:
Mass. G. L. (Ter. Ed.):
C. 234, s. 28 28
C. 266, s. 30 ..... 4, 33, 37
C. 266, s. 33(1) 37
C. 268, s. 8 (1961) 40, 41
C. 268, s. 9 (1961) 40, 41
C. 268A, ss. 1-4 (1962) (Mass. St. 1962, C. 779, ss. 1-4) 40
C. 277, s. 58 ..... 33, 34
C. 277, s. 59 33
C. 278, s. 9 45
Mass. St. 1958, C. 606 7-8

Miscellaneous

24 Am. Jur. 861 28
32 Am. Jur., Larceny, s. 113 45
Brown, Personal Property 47
22 C.J.S., Criminal Law, s. 185(18) 35
38 C.J.S., Grand Juries, s. 1 27
52 C.J.S., Larceny, s. 81 ..... 45, 47
73 C.J.S., Property, s. 1(c) 46
73 C.J.S., Property, s. 14 46
Holmes, The Common Law 46
Joyce, Indictments, s. 427 (2d Ed.) 47
Note, Federal Legislation—Trust Indenture Act of 1939, 28 Geo. L. J. 1084 47
2 Russell, Crime 1043 (10th Ed.) 47
2 Wharton, Criminal Law, s. 497 (1957) 47
2 Wharton, Criminal Procedure 1757 (1918) 27

In the
Supreme Court of the United States

OCTOBER TERM, 1964

No.

RICHARD K. GORDON *et al.*,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Petitioners, Richard K. Gordon and Richard C. Simmers, by their attorneys, severally pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts, entered on October 5, 1964.

Opinion of the Court Below

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, printed in Appendix A hereto*, is reported in 1964 Mass. Adv. Sh. 1155, 201 N.E. 2d 504.

*Appendix A is bound separately.

Jurisdiction

The judgment of the court below was entered on October 5, 1964, and is printed in Appendix F hereto. Petitions for rehearing were denied on October 8, 1964, and on October 27, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1257 (3) since petitioners had specially set up and claimed certain rights under the Constitution of the United States.

Questions Presented

I. Must a State that provides a grand jury for the initiation of criminal prosecutions require that such grand jury and each juror thereof be free of bias or prejudice in order to meet the federal standards of due process of law required by the Fourteenth Amendment to the Constitution?

II. Was it a violation of the Due Process Clause of the Fourteenth Amendment for the trial judge to refuse to permit counsel for petitioners to examine prospective petit jurors on *voir dire*, and for the trial judge to conduct an examination that was not sufficient to discover the hidden prejudices of the petit jurors, when there had been substantial pre-trial prejudicial publicity?

III. Was it a violation of the Constitution of the United States for the Commonwealth to convict petitioners for larceny when the evidence showed that the larceny concerned took place outside the territorial boundaries of the Commonwealth?

IV. When, under the established construction of the venue statutes, venue for the case presented by the prosecution could not be laid in Suffolk County or in any other county in Massachusetts, did the decision of the Supreme Judicial Court in this case, overruling the earlier construction, and adopting a construction which permitted

venue to be laid in Suffolk County, Massachusetts, violate petitioners' rights under the Due Process Clause of the Fourteenth Amendment, and the *Ex Post Facto* Clause of Article I, section 10, of the United States Constitution?

V. Was it a violation of the Due Process Clause of the Fourteenth Amendment and the *Ex Post Facto* Clause of Article I, section 10, of the Constitution of the United States, for the Commonwealth to convict petitioners of larceny by false pretences when the evidence was insufficient to show:

> A. that petitioners (1) had any intent to steal, or (2) knowingly joined in a conspiracy to steal, or (3) knew that false representations were made, or (4) concurred in the making of the false representations, or directed them, or that they were made in petitioners' presence; or
>
> B. that the Massachusetts Parking Authority, or any of its members, servants, agents, or employees, believed the truth of and relied upon, the allegedly false statements; or
>
> C. that the Massachusetts Parking Authority had either a general or a special property interest in, or possession or constructive possession of, the money alleged to have been stolen;

when, prior to the decision below, such proof would have been required for conviction?

Constitutional Provisions Involved

The constitutional provisions involved are Article I, section 10, clause 1, Article IV, section 2, clause 2, and section 1 of the Fourteenth Amendment of the Constitution of the

United States, and Article 12 of the Declaration of Rights of the Massachusetts Constitution. They are printed in Appendix B, *infra*, p. 50.

Statutes Involved

The following sections of the Massachusetts General Laws (Ter. Ed.) are involved: c. 234, s. 28; c. 266, s. 30; c. 268, s. 8 (1961); c. 268, s. 9 (1961); c. 277, s. 58; c. 277, s. 59; c. 278, s. 9. In addition, Mass. St. 1958, c. 606; Mass. St. 1962, c. 779. They are printed in Appendix C, *infra*, pp. 51-61.

Statement of the Case

On May 31, 1962, a Suffolk County, Massachusetts, grand jury returned two indictments in which the petitioners Richard K. Gordon and Richard C. Simmers were named as defendants. Indictment No. 4018 of 1962 (No. 8185 of 1964) charged that on March 2, 1960, the defendants Gordon and Simmers, and the defendants George Lewis Brady and Francis W. Kiernan "did steal money of the amount and of the value in all of four hundred and fifty thousand dollars, of the property of the Massachusetts Parking Authority, a body politic and corporate."[1] (R.[2] 1-2.) Indictment No. 4020 of 1962 (No. 8187 of 1964) charged that between December 2, 1958 and the date on which the indictment was returned, the defendants Gordon and Simmers conspired with Brady and Kiernan, also named as defendants, and with The Foundation Company, a New York corporation, William F. Thompson and Maurice A. Broderick, named as co-conspirators but not as defendants, to steal "money of an amount and value in excess of one

[1] In violation of G.L. (Ter. Ed.) c. 266, s. 30.

[2] The Summary of the Record will be referred to as "R.".

hundred dollars, of the property of the Massachusetts Parking Authority." (R. 135-136.)[3]

At their arraignment on June 4, 1962, the petitioners Gordon and Simmers remained mute. Pleas of not guilty were entered in their behalf by direction of the court. (R. 2-3.)

Prior to trial, the petitioners moved in each case for a bill of particulars. (R. 3, 137.) The Commonwealth's amended bill of particulars filed pursuant to the order of the court in the larceny case, No. 4013 of 1962 (No. 8185 of 1964), specified as the place where the offense was alleged to have been committed: "From the Massachusetts Parking Authority Construction Fund Trustee Account in the custody of The First National Bank of Boston, at Boston, Suffolk County, Massachusetts." The amended bill of particulars also specified as the manner and means by which the offense was alleged to have been committed: "The defendant(s) with intent to defraud obtained by false pretenses the making of a check and in consequence and by means thereof and as part of the same transaction by said false pretenses and with said fraudulent intent induced another to part with said check and with money, and thereby obtained said money; said false pretenses being false representations by word and by act and by the making, execution and submission of false and fraudulent documents including contracts, bills, requisitions and statements for services and work never performed which were well known

[3] Actually, the grand jury returned six indictments including the two summarized in the text. Nos. 4017 and 4019 of 1962 did not involve the defendants Simmers and Gordon and their motion to be tried separately from those indictments was allowed (R. 6-7). No. 4021 of 1962 (No. 375 of 1963) charged the defendants Simmers, Gordon and Kiernan with conspiring to extort money from The Foundation Company. No. 4022 of 1962 (No. 376 of 1963) charged Kiernan alone with extorting money from that company. All three defendants were acquitted by direction of the court on No. 4021 of 1962 and No. 4022. (Tr. 1620-1623.)

to be false and fraudulent by said defendant(s)." (R. 54-55, 75-76.) The Commonwealth's bill of particulars, filed pursuant to the order of the court in the conspiracy case, No. 4020 of 1962 (No. 8187 of 1964), specified as the place where the offense was alleged to have been committed: "Boston, Suffolk County, Massachusetts, and each and every other place where the opportunity arose to conspire to commit the offense set forth in the indictment;" and as the manner and means by which the offense was alleged to have been committed: "Each defendant assisted one or more of the other defendants in conspiring to commit the offense set forth in the indictment; and more particularly by the certification of a false and fraudulent requisition by the defendant Kiernan and resulting in the stealing of money of an amount and value in excess of $100, the property of the Massachusetts Parking Authority." (R. 175-176.)[4]

The petitioners also moved prior to trial to quash both indictments because returned by grand juries calculatedly prejudiced against them by governmentally inspired publicity in violation of the Due Process Clause of the Fourteenth Amendment to the Federal constitution. After a hearing, that motion was denied by Superior Court Judge Quirico. The petitioners saved their exceptions. (R. 78-93; Tr.[5], dated February 15, 1963.)

Trial was scheduled to commence before Judge Quirico and a jury on April 1, 1963.[6] At the opening of court that morning, the petitioners again moved (1) for a continuance

---

[4] The Commonwealth's motion to amend the indictment, by deleting the name of the Authority as the body politic whose money was stolen, and "by substituting therefor the words 'The First National Bank of Boston, a national banking corporation, as Construction Fund Trustee of the Massachusetts Parking Authority Construction Fund Trustee Account' ", was denied. (R. 11.)

[5] The transcript will hereinafter be referred to as "Tr.".

[6] Prior to that time, the court ruled that Brady was mentally incompetent to stand trial (R. 12.) Brady still has not been tried.

and, in the alternative, for a change of venue, and (2) to discharge the jury panel, because the effect of the massive, prejudicial publicity had not so far worn off that it could reasonably be said, as required by Art. 12 of the Declaration of Rights to the Massachusetts Constitution and the Fourteenth Amendment to the Federal Constitution, that the trial could proceed in Suffolk County free of the hostile atmosphere and public preconception of guilt prevalent at that time. After a hearing, that motion was denied subject to their exceptions. (R. 13; Tr. 11-19.) The petitioners then moved for leave to conduct a *voir dire* examination of prospective jurors and, in the alternative, for the court to put suggested questions to the prospective jurors, to enable the petitioners to prove that many, if not all, of the prospective jurors had been in fact prejudiced by the massive, prejudicial pre-trial publicity. That motion was also denied after a hearing. They claimed exceptions to such denial. (R. 13-14; Tr. 19-24.)

At the trial, which continued for more than two weeks to April 16, 1963, there was evidence from which the jury could have found the following:

On October 3, 1958, the legislature enacted St. 1958 c. 606 (Ex. 1.). That Act created the Massachusetts Parking Authority (hereinafter sometimes referred to as the "Authority"), consisting of three members (s. 3); and defined its powers and duties, including the authority to construct, maintain and operate a public garage under the Boston Common, (b) to finance the cost of the construction of the garage by the issuance of Common garage revenue bonds payable solely from revenues and (c) to enter into or adopt a trust agreement or resolution which would contain provisions for the issuance of such bonds, for the use of the proceeds thereof [which were to be deemed to be trust funds] solely for the payment of the cost of the project, for the pledge or assignment of the revenues as security for

the payment of the bonds, and for the protection and enforcement of the rights and remedies of the bondholders (ss. 5. 8, 9, 12).

Following the creation of the Authority, George Lewis Brady, Joseph W. Monahan, Jr., and Herman Carp were appointed as members of the Authority. Brady was designated as Chairman. Soon after his appointment, Carp resigned and James J. Sullivan, Jr., was appointed in his stead. The first two and Sullivan continued to serve during the events hereinafter described. (Exs. 2-A - 2-E, inclusive.)

In the spring of 1959, Brady met William F. Thompson, Chairman of the Board of Directors of The Foundation Company, at LaGuardia Airport. Thompson was named as a co-conspirator, but not as a defendant, in the conspiracy indictment. Brady told Thompson that The Foundation Company would have to pay $300,000 to get the Parking Garage contract and that unless The Foundation Company would do this, they would not get the job. Brady also said that he understood that the company had a box of cash that it kept for this purpose. Thompson denied that this was the case.[7] (Tr. 915-925.)

Later that spring, Maurice A. Broderick, a New Hampshire attorney and a brother-in-law of Brady, met Thompson at the Ten Park Avenue Hotel, New York City. Also present were William A. Shea, an attorney for The Foundation Company, and one Dolan, the President of a Waltham Bank. Broderick was named as a co-conspirator, but not as a defendant, in the conspiracy indictment. At the meeting, Thompson suggested that the $405,000.00, which The Foundation Company was to pay to Brady, could be paid over in the form of a finder's fee, an attorney's fee and a subcontract—$150,000.00 for a finder's fee, $100,000.00

[7] The classic example of a request for a bribe.

as an attorney's fee and $155,000.00 for a subcontract. Broderick told Brady about his talk with Thompson. (Tr. 467-469.)

On April 1, 1959, Broderick organized a New Hampshire corporation under the name of Granite State Realty & Construction Co., Inc. (Tr. 461-463.)

In November of 1959, Broderick asked a friend of his, Edward F. Plourde, whether the latter would be willing to serve as the finder of record and receive for him a fee of $150,000.00 in connection with a Boston construction project. Plourde agreed to act as the finder of record. (Tr. 689-692.)

On February 20, 1960, Broderick went to the New York office of The Foundation Company where three letters were prepared and then signed by Chester W. Campbell as President of The Foundation Company. The first letter (Ex. 16), back-dated to May 4, 1959, was addressed to Plourde. In that letter the company offered to pay Plourde a finder's fee equal to two percent of the gross contract price of any construction work that the company obtained through his efforts. The letter provided that if Plourde's fee on any one job should exceed $100,000.00, the company would pay him a sum not to exceed $100,000.00 on the signing of the contract and the balance in the same proportions as the company received its payments from the owner. The second letter (Ex. 17), back-dated to June 17, 1959, was addressed to Broderick. In that letter, the company agreed to pay Broderick for legal services rendered and to be rendered for the Boston Common Garage and other projects the sum of $100,000.00 as follows: $50,000.00 "upon receipt of the mobilization item. $15,000.00 60 days thereafter and the balance of $35,000.00, February 1, 1961." The third letter (Ex. 15) was only back-dated to February 11, 1960. It was addressed to Granite State Realty & Construction Co., Inc. It stated that upon the company's obtaining a contract with the Authority for the Boston Common Garage, it would

enter into a contract with Granite State Realty & Construction Co., Inc., under the terms of which it would pay Granite State Realty & Construction Co., Inc. $40,000.00 for the construction of four buildings, $25,000.00 for the construction of certain fences, $40,000.00 for the construction of four kiosks and $50,000.00 for the attached list of construction equipment and supplies. (Tr. 473-479.)

On February 23, 1960, the Authority, pursuant to Resolution No. 7 (Ex. 10), executed an underwriting agreement (Ex. 11) with John Nuveen & Co. (hereinafter sometimes called "Nuveen"). By the terms of that agreement, Nuveen agreed to underwrite the sale of $9,600,000.00 worth of the Authority's Common garage revenue bonds, provided that "at the time of closing, the Authority shall have entered into a . . . contract . . . for the construction of the Boston Common Garage . . . with The Foundation Company . . . which contract shall provide that the time of construction shall commence upon the date of delivery of the bonds to the undersigned (Nuveen) and payment therefor and the payment by the Authority to The Foundation Company of the initial payment for architectural and engineering services theretofore rendered, as provided in Article 5(a) of said contract . . ." (Ex. 11; Tr. 370.)

On the same day, February 23, 1960, the Authority also adopted Resolution No. 8, establishing four trusts called Construction Fund, Sinking Fund, Revenue Fund and Reserve Maintenance and Replacement Fund (Ex. 6, pp. D-7, D-13, D-14; Tr. 324-331.) Section 402A of that resolution provided that a portion of the proceeds realized from the sale of the bonds was to be "deposited with and held by the Construction Fund Trustee . . . for the credit of the Construction Fund, . . . held in trust and applied only for the payment of the Cost of the Project . . . , and (were by the resolution) . . . assigned to and pledged to the Construction Fund Trustee, pending such application, for the benefit

of the Holders of the Bonds and for the security of the payment of the principal of and interest on such Bonds, and shall at all times be subject to the lien of such assignment and pledge until paid out and transferred as herein provided." (Ex. 6, pp. D-7, D-8; Tr. 325-326.) Section 406 of the resolution provided that before any payment could be made on account of the Cost of the Project, the Authority was required to file with the Construction Fund Trustee (A) a requisition, signed by an authorized officer of the Authority, setting forth the name of the person to whom the payment was to be made, the amount to be paid, the purpose, by general classification, for which the payment was to be made, and that obligations in the stated amount had been incurred by the Authority and that each item included in the requisition was a proper charge against moneys in the Construction Fund and had not been paid; and (B) a certificate, signed by the Construction Engineer and attached to the requisition, certifying his approval thereof and that each obligation had been properly incurred and was then due and unpaid and that, in so far as such obligation had been incurred for work, materials, equipment or supplies, such work had actually been performed, or such materials, equipment or supplies had actually been installed, in furtherance of the construction of the Project or delivered at the site of the work for that purpose, or delivered for storage or fabrication at a place or places approved by the Construction Engineer. (Ex. 6, pp. D-9, D-10; Tr. 326-329.)

On the same day, the Authority passed Resolution No. 11, appointing the New York firm of Muzillo and Tizan as Construction Engineer. (Ex. 8; Tr. 341-342.)

At the same time, the Authority also adopted Resolution No. 13, designating the First National Bank of Boston as the Construction Fund Trustee. (Ex. 9; Tr. 343.)

Also adopted on February 23, 1963, was Resolution No.

14, authorizing the execution of a contract for the construction of the Boston Common Garage project with The Foundation Company. The resolution approved the form of contract to be executed with The Foundation Company, on which appeared in writing, "Within contract hereby approved, Muzillo and Tizan, by F. W. Kiernan." The form of contract provided for the payment of $7,500,000.00 for all of the work, of which six percent was to "be paid to the contractor (The Foundation Company) on the effective date of this contract as payment for architectural and engineering services heretofore rendered by the contractor in connection with the project," and the balance on the basis of monthly requisitions. (Ex. 7; Tr. 332-335.)

On March 2, 1960, the closing took place at the New York offices of The Foundation Company. (Tr. 1156-1182.) Among those present were Brady, Monahan and Sullivan, the Chairman and Members, respectively, of the Authority; Mrs. Dolores Arena, Secretary-Treasurer of the Authority; the defendant Kiernan; George J. Gruner, Vice President of Nuveen, the underwriters; William F. Thompson and Chester W. Campbell, Chairman of the Board and President, respectively, of The Foundation Company; and Walter N. Burnett, assistant Vice President of the First National Bank of Boston. (Tr. 305-307.)

The contract with The Foundation Company (Ex. 4) was executed as the first order of business. It was signed by Brady, Monahan and Sullivan in behalf of the Authority; by the defendant Kiernan for Muzillo and Tizan, the Construction Engineer; and by Campbell for The Foundation Company. (Tr. 308.) Then Burnett delivered to the Authority a letter (Ex. 59), signed by Joseph Birmingham, a Vice President of the First National Bank of Boston, accepting appointment as Trustee of the Construction Fund, pursuant to the Authority's Resolution No. 13. Gruner then delivered Nuveen's check made out to the Authority for

$7,732,000.00 (Ex. 70), representing a portion of the net proceeds realized from the sale of the bonds, to Brady, who endorsed it and then handed it over to Mrs. Arena. She endorsed and delivered the check to Burnett, who then deposited that check into the First National Bank of Boston's standing New York account in the Chemical Bank New York Trust Company, by delivering that check and a deposit slip to a representative of that bank.

At the same time, Requisition No. 1 (Ex. 5), signed by Brady, Herman Carp, who upon his resignation as a member of the Authority had been appointed as its General Manager, and the defendant Kiernan, was delivered to Burnett. That requisition, which was completed in New York, authorized the Trustee to pay $200,000.00 to the Commonwealth in repayment for the temporary funds advanced by it to the Authority and to pay $450,000.00 to The Foundation Company in "payment for architectural and engineering services as required by Construction Contract." (Tr. 316-318, 1163, 1283.)

Upon determining then and there that the requisition was in proper form, Burnett made out and delivered to The Foundation Company a First National Bank of Boston check for $450,000.00 (Ex. 23), drawn on its New York account in the Chemical Bank New York Trust Company. (Tr. 1164, 1167, 1180-1181, 1215-1217, 1225-1228, 1257, 1275, 1318-1319.) As of March 2, 1960, The Foundation Company had spent or incurred a total of only $35,246.44 for all expenses in connection with the project, including architectural and engineering services. (Tr. 1394.)

Later that day, The Foundation Company deposited that check in its account in the Chase Manhattan Bank in New York (Tr. 1408), and then issued to Plourde its check for $100,000.00 (Ex. 24), drawn on its account in the Chase Manhattan Bank (Tr. 703.)

On March 3, 1960, Plourde deposited that check in an

account in his name in the Manufacturers' Trust Company, also in New York. (Tr. 708-709.)

On March 7, 1960, the Authority ratified Brady's acts in delivering the bonds, accepting payment for them, turning a portion of the net proceeds received in payment of the bonds over to the Construction Fund Trustee, the First National Bank of Boston, and approving for payment Requisition No. 1 (Ex. 12.)

On March 24, 1960, The Foundation Company delivered to Plourde a check for $45,000.00 (Ex. 26), drawn on its New York account in the Chase Manhattan Bank. (Tr. 723.) The delivery of that check was made in New York. (Tr. 721-723.) Because the balance of the so-called finder's fee was being paid in advance, The Foundation Company was given a $5,000.00 discount. (Ex. 72; Tr. 1384-1385.) Plourde deposited that check in his New York account in the Manufacturers' Trust Company. (Tr. 726-727.)

That same day, Brady suggested to Broderick and Plourde that Plourde make out two checks payable to the petitioner Simmers:[8] one for $95,000.00 and the other for $45,000.00, because, as Brady said, he (Brady) had to get the money into Massachusetts. (Tr. 731-739.) At Broderick's request, Brady signed a note, which Broderick made out, authorizing the payment of the $140,000.00 to the defendant Simmers. (Ex. 19; Tr. 498-507.) Plourde made out the two checks. (Tr. 733-735.)

On March 30, 1960, John J. Craven agreed, at the request of the petitioner Gordon,[9] to act as a straw in a real estate transaction to be consummated in New York. (Tr. 892-893.)

The next day, the petitioners and Kiernan, Plourde and Craven met at the Manufacturers' Trust Company in New York. (Tr. 898-899.) On the way to the bank, the petitioner Simmers purchased a brief case. (Tr. 895.) Acting under

---

[8] This was the earliest date on which the name of Simmers appeared.

[9] This was the earliest date on which the name of Gordon appeared.

instructions from Brady (Tr. 745-746), Plourde drew a check on his account in that bank for $140,000.00, (Ex. 27.), made payable to Craven (Tr. 752-755). He made out and signed the check in an office of the bank in the presence of Simmers, Gordon, Kiernan, and Craven. In the meantime, Kiernan had torn up the two checks that Plourde had made payable to Simmers on March 24, 1960. (Tr. 731-733, 748-749.) Craven then endorsed the check (Ex. 27) and delivered it to the manager of the bank with the request that it be cashed. (Tr. 897-898.) They all waited until the manager returned with the money, which Craven counted in the presence of Plourde, Simmers, Gordon and Kiernan. (Tr. 898-899.) After the money was counted, Simmers put the money into the brief case and they all left the bank. (Tr. 900.)

Kiernan and Plourde then proceeded with the brief case to the Birdcage Room in the Hotel Barclay in New York where they met Brady. (Tr. 759-760.) The brief case was placed on the floor, and Brady removed the money from it. (Tr. 761-765.) Plourde kept $5,000.00, most of which was still on deposit in his account, as a fee for acting as the finder of record. (Tr. 774-755.)

Later that day, Craven met Gordon in Manhattan and was paid $500.00 for endorsing and cashing the check for $140,000.00. (Tr. 901.)

There was no evidence concerning the further disposition of the so-called finder's fee or any part thereof.

On or about April 19, 1960, The Foundation Company sent its check for $50,000.00 (Ex. 20) to Broderick in New Hampshire. (Tr. 518.) He returned that check to The Foundation Company in New York, accompanied by a letter, back-dated to February 1, 1960 (Ex. 21), assigning his interest in the agreement, set forth in The Foundation Company's letter to him, dated June 17, 1959 (Ex. 17), to the petitioner Gordon. (Tr. 521-522, 604.)

At no time before or after that incident did Broderick see, meet or communicate with either the petitioner Gordon or the petitioner Simmers. (Tr. 538-539.)

On April 26, 1960, The Foundation Company sent three checks (Exs. 42, 43 and 44), totaling $100,000.00 to Gordon. By letter, dated April 29, 1960 (Ex. 79), Gordon acknowledged the receipt of the three checks and agreed to represent The Foundation Company in Massachusetts. (Tr. 1405.)

On April 28, 1960, one of the three checks (Ex. 43) in the sum of $15,000.00 was cashed at the Broadway Savings Bank in Lawrence, Essex County, Massachusetts. (Tr. 1496-1497.) Gordon received for that $15,000.00 check $5,000.00 in currency and three bank checks (Ex. 82), totaling $10,000.00. (Tr. 1497.) There was no evidence concerning the further disposition of that money or any portion thereof.

On May 6, 1960, Gordon deposited two of the checks (Exs. 42 and 44), totalling $85,000.00 in an account in the name of "Richard Gordon, Trustee," at the Merrimack Valley Bank, Andover, Essex County, Massachusetts. (Tr. 1540.) On May 9, 1960, Gordon drew a check for $85,000.00 on that bank and then cashed it at the bank. (Tr. 1544.) Simmers carried the money from the bank. (Tr. 1544-1546.) There was no evidence concerning the further disposition of any of that money or any portion of the so-called legal fee.

In the meantime, Broderick had assigned his interest in the Granite State Realty & Construction Co., Inc. to Brady. (Tr. 530.)

On June 17, 1960, the petitioners Simmers and Gordon opened an account in the name of the corporation at the Merrimack Valley Bank, Andover, Essex County, Massachusetts. (Tr. 1504-1506.) Each was authorized to sign checks against that account. (Exs. 84, 86; Tr. 1530-1531.) At the same time, The Foundation Company's check, dated June 8, 1960 (Ex. 45), for $40,000.00 was endorsed by

Gordon as Treasurer of the corporation and deposited in that account. (Ex. 85; Tr. 1514-1517.)

In September of 1960, a bill, back-dated to June 1, 1960, on stationery entitled "Granite State Realty & Construction Co., Inc., 3 Main Street, Andover, Massachusetts," was sent to he Foundation Company in New York asking payment of $40,000.00 for the construction of the four buildings for the Boston Common Garage Project. (Ex. 76; Tr. 1398-1399.)

A second bill, back-dated to August 1, 1960 (Ex. 78), was sent to The Foundation Company in New York, asking payment of $25,000.00 for the construction of fences and $40,000.00 for the construction of four kiosks for the Boston Common Garage Project.

On March 3, 1961, The Foundation Company sents its check (Ex. 46) for $25,000.00 to the Granite State Realty & Construction Co., Inc., in Andover, Mass. That check was endorsed by Simmers and Gordon, as President and Treasurer, respectively, of the corporation, and deposited into the corporation's account at the Merrimack Valley National Bank. (Ex. 83; Tr. 1514-1517.)

The following withdrawals were made by check from that account (Ex. 85):

Name of The Payee	*Amount*
Simmers	$18,000.00
Gordon	2,500.00
Gordon and Simmers (2 cashier's checks @ $5,000)	10,000.00
Gordon	700.00
Simmers	700.00
The Schoolhouse, Inc.	78.80
Cash (Simmers & Gordon)	800.00
Cash (Simmers & Gordon)	2,500.00
Simmers	10,000.00
Total	$45,278.80

There was no evidence concerning the further disposition of any of that money or of any of the money remaining in that account. No other payments were made by The Foundation Company for or on account of its so-called sub-contract with the Granite State Realty & Construction Co., Inc., which had performed no work on, and had furnished no equipment or supplies for, the Boston Common Garage Project. (Tr. 1453-1455.)

None of the Authority members or employees or agents thereof testified that he relied on the truth of any of the representations made by any of the defendants or by Brady or anyone else. Nor was there any evidence that either Simmers or Gordon had participated in any act or conversation or was even mentioned by anyone prior to March 24, 1960, or that any of the money allegedly stolen was ever in Massachusetts.

During the course of the trial, the petitioners Gordon and Simmers saved exceptions to (1) the denial of their motions that they be given an opportunity to inspect a particular portion of the transcript of the grand jury proceedings (Tr. 1171), (2)the failure carefully and clearly to limit hearsay declarations at the time of their admission and to instruct the jury as to the limitations to be put upon such declarations, (3) the admission of a series of checks and requisitions (Exs. 62, 63), offered for the purpose of establishing that the Authority had a general or special interest in, or actual or constructive possession of, the money allegedly stolen (Tr. 1187-1188), (4) the denial of their motions for directed verdicts of not guilty filed at the conclusion of all the evidence (Tr. 1784-1786), and (5) the

trial judge's instructions to the jury and his refusal to grant certain requested instructions[10] (Tr. 2001-2007).

On April 16, 1963, the jury returned verdicts of guilty in both indictments against the petitioners and against Kiernan.

On April 22, 1963, each was sentenced to be imprisoned: under Indictment No. 4018 of 1962 (No. 8185 of 1964), for not more than three and not less than two and one-half years in the Massachusetts Correctional Institution, Walpole, and under Indictment No. 4020 of 1962 (No. 8187 of 1964), for two and one-half years in the House of Correction, the sentences under No. 4020 of 1962 (No. 8187 of 1964) to take effect from and after the sentences imposed under No. 4018 of 1962 (No. 8185 of 1964). Execution of the sentences was stayed pending appeal.

On April 24, 1963, the petitioners Gordon and Simmers filed their claims of appeal.

On October 5, 1964, the Supreme Judicial Court of Massachusetts affirmed the convictions. On October 8, 1964, and on October 27, 1964, the Supreme Judicial Court denied petitions for rehearing. (Appendix E, *infra*, pp. 74-78.)

On October 13, 1964, The Superior Court revoked the stays of execution of sentence, and petitioners have since been incarcerated. On October 14, 1964, the Supreme Judicial Court denied petitions for stays of execution pending action by this Court. On November 16, 1964, Justice Goldberg of this Court denied petitioners' applications for stays pending action by this Court.

---

[10] At the conclusion of the evidence, the court, on motion of Simmers, Gordon and Kiernan, directed the return of verdicts of not guilty on indictment No. 4021 of 1962, charging all three with conspiracy to extort and on indictment No. 4022 of 1962, charging Kiernan with extortion; and struck all evidence specifically limited to those indictments. (Tr. 1620-1623.)

Reasons for Granting the Writ

I. The Petitioners' Rights to Due Process of Law Under the Fourteenth Amendment Were Denied Because the Commonwealth Did Not Ensure That the Grand Jury That Indicted Them Was Free From Bias and Prejudice When There Had Been Substantial Prejudicial Pre-Indictment Publicity in Large Part Stimulated by Officials of the Commonwealth.

This is substantially the same question as the first question upon which this Court granted certiorari in *Beck* v. *Washington,* 365 U.S. 866, 82 S. Ct. 955, although the majority of the Court found it unnecessary to reach the question after argument. 369 U.S. 541. The Court said:

> "It may be that the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury. [Citations omitted.] But we find that it is not necessary for us to determine this question; for even if due process would require a State to furnish an unbiased body once it resorted to grand jury procedure—a question upon which we do not remotely intimate any view—we have concluded that Washington, so far as is shown by the record, did so in this case." 369 U.S. at 546, 82 S. Ct. at 958.

The major distinction between the case at hand and the *Beck* case is that here petitioners were denied the right to prove that the grand jury that indicted them was prejudiced (R. 78, 79) because, unlike the State of Washington, the Commonwealth of Massachusetts does not require an unbiased grand jury.

In *Commonwealth* v. *Woodward,* 157 Mass. 516, 518-519,

32 N.E. 939, 940, the Supreme Judicial Court held that, "It is not . . . necessary that each grand juror shall be free from bias or prejudice, provided he has the general qualifications which are required." That statement was cited with approval in *Commonwealth* v. *Geagan*, 339 Mass. 487, 498, 159 N.E. 2d 870, *cert. den.* 361 U.S. 895, 80 S. Ct. 200, *habeas corpus den. Geagan* v. *Gavin*, 292 F.2d 244 (1st Cir.), *cert. den.* 370 U.S. 903, 82 S. Ct. 1297, the case upon which the Supreme Judicial Court relied to uphold the convictions in this case. 1964 Mass. Adv. Sh. at 1156-1157, 201 N.E. 2d at 506, Appendix A, pp. 1156-1157, *infra*.

The question in this case, therefore, cannot be disposed of as it was in the *Beck* case. Here, the policy in Massachusetts is that a grand jury need not be fair. Therefore, the Commonwealth provided no procedure whereby the petitioners could prove bias. In the *Beck* case, on the other hand, the State provided a *voir dire* proceeding. Two of the prospective grand jurors who admitted prejudice were excused. Three others whose background indicated possible prejudice were excused. No grand juror personally knew Beck or was shown to be adverse to the institutions with which he was generally identified. 369 U.S. at 546-549, 82 S. Ct. at 958-959.

In the *Beck* case, the State of Washington took measures to ensure that the grand jury would be unbiased. Here there was no such procedure. The question here is not whether the Commonwealth's procedures for securing a grand jury were fair, but whether the Commonwealth may ignore the question of fairness completely.

Although the question was not directly answered in the *Beck* case, prior cases indicate what the answer must be. First of all, the judicial construction that the Fourteenth Amendment does not necessarily require state prosecutions to be instituted by indictments of grand juries, *Hurtado* v. *State of California*, 110 U.S. 516, 4 S. Ct. 111; *Kennedy* v.

Walker, 337 U.S. 901, 69 S. Ct. 1046, has never deterred this Court from setting aside a state court conviction solely on the ground that it was commenced by an indictment returned by a grand jury from which Negroes had been intentionally excluded. *Pierre* v. *State of Louisiana*, 306 U.S. 354, 59 S. Ct. 536; *Hill* v. *State of Texas*, 316 U.S. 400, 62 S. Ct. 1159; *Cassell* v. *State of Texas*, 339 U.S. 282, 70 S. Ct. 629; *Reece* v. *State of Georgia*, 350 U.S. 85, 76 S. Ct. 167; *Michel* v. *State of Louisiana*, 350 U.S. 91, 76 S. Ct. 158; *Eubanks* v. *State of Louisiana*, 356 U.S. 584, 78 S. Ct. 970. Nor has the Court been reluctant to set aside a state court conviction because of unfair appellate procedures, even though the Fourteenth Amendment has never been construed to require a state "to provide appellate courts or a right to appellate review at all." *Griffin* v. *People of the State of Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 590; *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 78 S. Ct. 1061; *Burns* v. *State of Ohio*, 360 U.S. 252, 79 S. Ct. 1164; *Douglas* v. *Green*, 363 U.S. 192, 80 S. Ct. 1048. Thus it seems clear that the Fourteenth Amendment protects persons like petitioners from all sorts of invidious acts at every stage of the proceedings—from the very beginning to the end—even during a stage not required by constitutional due process. As a matter of fact, in *Frank* v. *Mangum*, 237 U.S. 309, 35 S. Ct. 582, the Court said, 237 U.S. at page 327, 35 S. Ct. at 587, "(W)hile the 14th Amendment does not require that a State shall provide for an appellate review in criminal cases . . . , it is perfectly obvious that where such an appeal is provided for, . . . the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which (the prisoner) . . . is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment."

Second, this Court has already rejected, as a reason for upholding an indictment returned by a grand jury from which Negroes had been excluded, the argument that " 'the Constitutional rights of the defendant (are) . . . not affected by reason of the fact that persons of the Colored . . . race are not placed on the Grand Jury because . . . the mere presentment of an indictment is not evidence of guilt . . . it simply informs the court of a commission of a crime and brings the accused before the court for prosecution' ". In spurning that argument, this Court noted that the Louisiana constitution provided that "no person shall be held to answer for capital crime unless on a presentment or indictment by a grand jury, . . ."; and that the Louisiana law prohibits the exclusion of qualified Negroes from service on grand and petit juries. *Pierre* v. *State of Louisiana*, 306 U.S. 354, 356-358, 59 S. Ct. 536, 538. Similarly, in Massachusetts, the general rule is that no person shall be held to answer for a felony unless upon indictment by a grand jury, art. 12 of the Declaration of Rights of the Massachusetts Constitution; *Jones* v. *Robbins*, 74 Mass. (8 Gray) 329; *DeGolyer* v. *Commonwealth*, 314 Mass. 626, 627, 51 N.E. 2d 251, 252; and it is unlawful for a prosecutor to "attempt to influence the grand jurors in the performance of their duties," *Attorney General* v. *Pelletier*, 240 Mass. 264, 307-310, 134 N.E. 407, 419-420. In Massachusetts, as in Louisiana, the guarantee of indictment by a properly constituted grand jury is a basic safeguard.

Third, all of the arguments that there is no federal constitutional right to a fair grand jury so long as the accused receives a trial by a fair petit jury must have been considered and rejected in *Cassell* v. *State of Texas*, 339 U.S. 282, 70 S. Ct. 629. It is true, of course, that the rejection of that argument occurred in a case in which a state indictment was attacked by a Negro defendant because of the intentional exclusion of Negroes from the grand jury.

Nevertheless, the reason for such rejection is equally valid here. Moreover, the danger of the return of a groundless indictment against an innocent person is at least as great in the case of a grand jury prejudiced because of publicity as it is in the case of a jury prejudiced because of race.

Fourth, the Fifth Amendment to the federal constitution not only requires federal prosecutions for serious crimes to be instituted by indictment, but also guarantees due process of law to all federal prisoners. It must have been the due process clause of that amendment which this Court had in mind in *Costello* v. *United States,* 350 U.S. 359, 363, 364, 76 S. Ct. 406, 409; *Lawn* v. *United States,* 355 U.S. 339, 349, 78 S. Ct. 311, 317, when it said in effect that the Fifth Amendment calls for an indictment returned not only by a legally constituted grand jury, but also by an unbiased grand jury.

Moreover, Mr. Justice Black, with whom Chief Justice Warren and Mr. Justice Douglas concurred, spelled out the constitutional right in a dissent in *Michel* v. *State of Louisiana,* 350 U.S. 91, 76 S. Ct. 158. There he said at pages 102-104 of 350 U.S., 76 S. Ct. at 165-166, that every person has a constitutional right "*to have the charges against (him) . . . considered by a fair and legal grand jury*". Every person has the "*federally guaranteed right to have his case considered by an unpacked grand jury*". No person can be constitutionally convicted "*until after adequate notice and a fair trial on an indictment returned by a fair grand jury selected without regard to race or color*". "*Under our system even a bad man is entitled to have his case considered at every stage by a fair tribunal.*" (Italics Supplied.) Although Mr. Justice Black was discussing at one point federal prosecutions, what he said applied to both state and federal prosecutions.

Furthermore, if the Due Process Clause in the Fifth Amendment requires an unbiased grand jury, then the Due

Process Clause of the Fourteenth Amendment imposes the same requirement. For, as Mr. Justice Frankfurter said in a concurring opinion in *Malinski* v. *People of State of New York*, 324 U.S. 401, 415, 65 S. Ct. 781, 788, "to suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection."

Fifth, several Justices of this Court have recognized that every person has a right, guaranteed by the Fourteenth Amendment, to have the state charges against him, if presented to a state grand jury, considered by a fair and impartial grand jury.

In *Cassell* v. *State of Texas*, 339 U.S. 282, 70 S. Ct. 629, the state court's conviction of Cassell, a Negro, was reversed because the number of Negroes selected for grand jury duty had been intentionally limited in approximate proportion to the number of Negroes eligible for grand jury service. Realizing, no doubt, that it would be difficult logically to support reversal under the equal protection clause, for, if anything, selection on that basis would tend to provide mathematically equal treatment, Mr. Justice Reed commenced his opinion, concurred in by Chief Justice Vinson and Justices Black and Clark, by stating, "*Review was sought in this case to determine whether there had been a violation by Texas of petitioner's federal constitutional right to a fair and impartial grand jury*". (Italics supplied.) Mr. Justice Jackson also must have considered the issue to be the petitioner's constitutional right to an impartial grand jury, for, in his dissent, he argued unsuccessfully that since Cassell had been convicted by a fair trial jury, he could not possibly have been prejudiced by the grand jury and he, therefore, had no right to an impartial grand jury.

In *Michel* v. *State of Louisiana*, 350 U.S. 91, 102, 76 S. Ct. 158, 165, where this Court held that two of the petitioners

had waived their constitutional rights by not seasonably challenging the composition of the grand jury indicting them, and that the third petitioner had forfeited his constitutional right by fleeing from the State and remaining away until long after the expiration of the time allowed by state law to challenge the validity of the grand jury, the three dissenters, Mr. Justice Black, joined by Mr. Chief Justice Warren and Mr. Justice Douglas, criticized the majority for holding that, because the petitioners had failed to make a timely challenge to the composition of the grand jury indicting them, they waived 'their constitutional and statutory rights to have the charges against them considered by a fair and legal grand jury". In doing so, the dissenters, of course, recognized the federally guaranteed right to an unbiased grand jury.

In *Beck* v. *Washington*, 369 U.S. 541, 82 S. Ct. 955, Justice Douglas reiterated his position, 369 U.S. at 579, 82 S. Ct. at 975 (dissenting opinion), and the Chief Justice and Justice Black indicated that their views were the same, 369 U.S. at 558, 82 S. Ct. at 964 (dissenting opinion).

Thus it is seen from the *Beck, Cassell* and *Michel* cases, that at least seven Justices of this Court, including four of the present members, have said, or have joined in saying in one way or another, that every person has the right, guaranteed by the Fourteenth Amendment, not to be indicted by a prejudiced state grand jury.

Finally, the notion that a prosecutor may purposely prejudice a state grand jury with complete constitutional immunity is certainly a concept that is foreign to our standards of decency and fairness. As was said in *Costello* v. *United States*, 350 U.S. 359, 362, 76 S. Ct. 406, 408, the very purpose of the grand jury procedure is "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes."

Its object, according to *Stirone* v. *United States*, 361 U.S.

212, 218, 80 S. Ct. 270, 273, is to limit a person's jeopardy "to offences charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge". It was "designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity". *Ex parte Bain*, 121 U.S. 1, 11, 7 S. Ct. 781, 786. See also *Costello* v. *United States*, 350 U.S. 359, 362, 76 S. Ct. 406, 408; 2 Wharton, *Criminal Procedure* (1918) 1757; 38 C.J.S. 983. In *Jones* v. *Robbins*, 74 Mass. (8 Gray) 329, 344, Chief Justice Shaw said: "The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malacious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." See also to the same effect *Attorney General* v. *Pelletier*, 240 Mass. 264, 307-310, 134 N.E. 407, 419-420; *DeGolyer* v. *Commonwealth*, 314 Mass. 626, 627, 51 N.E. 2d 251, 252; *Blake* v. *State*, 54 Okla. Cr. 62, 67-70, 14 P. 2d 240, 242-243.

Moreover, the jealousy with which the safeguard has been sedulously preserved is well demonstrated by the following cases in each of which the conviction was reversed because of the prosecutor's influence upon the deliberations of the grand jury. *Williams* v. *State*, 188 Ind. 283, 303-307, 123 N.E. 209, 216-217; *State* v. *Crowder*, 193 N.C. 130, 136 S.E. 337; *Blake* v. *State*, 54 Okla, Cr. 62, 14 P. 2d 240; *Hammers* v. *State, Okla.*, 337 P. 2d 1097. See also *Attorney General* v. *Pelletier*, 240 Mass. 264, 307-310, 134 N.E. 407, 419; 38 C.J.S. 1042.

In the instant case, the headlines printed in the Summary of the Record (R. 40-44, 80-90, 159-162) show that the publicity emanated from the office of the Attorney General. Whether or not it was actually intended to prejudice potential grand jurors, it certainly could not have helped but produce that result. Where the prosecution has in its control the determination whether there will be publicity that may be prejudicial to potential defendants, the State ought to be held to higher standards than where the publicity was spontaneous and unavoidable.

For all of the foregoing reasons, petitioners believe that a person under investigation by a grand jury "is as much entitled to the just, impartial and unbiased judgment of that body as he is to that of the petit jury on his final trial," 24 *Am. Jur.* 861; and petitioners believe that a person who has been indicted by a state grand jury, prejudiced by substantial publicity, unchecked by any procedure for ensuring its fairness, has been denied the due process of law guaranteed him by the Fourteenth Amendment to the Federal Constitution.

II. The Petitioners' Rights to Due Process of Law Under the Fourteenth Amendment Were Denied Because the Trial Judge Did Not Ensure that the Petit Jury Was Free from Bias and Prejudice When There Had Been Substantial Prejudicial Pre-Indictment Publicity in Large Part Stimulated by Officials of the Commonwealth.

Under Chapter 234, section 28, of the Massachusetts General Laws (Ter. Ed.), the trial court *may* allow a *voir dire* examination of the prospective petit jurors by counsel, but need not. If the court does not allow counsel to conduct an examination, it must (on motion of either party) itself examine each prospective juror to learn: (1) "whether he

is related to either party," or (2) "whether he has any interest in the case," or (3) whether he "has expressed or formed an opinion," or (4) whether he "is sensible of any bias or prejudice, therein."

Whether any but the four questions be asked "rests wholly in the discretion of the judge." 1964 Mass. Adv. Sh. at 1159, 201 N.E. 2d at 508, Appendix A p. 1159, *infra*. "Seldom is it [the *voir dire* examination] permitted to extend beyond the statutory questions." *Commonwealth* v. *Di Stasio*, 294 Mass. 273, 280, 1 N.E. 2d. 189, 194.

Where a State does not provide a procedure for ensuring a fair grand jury—and, indeed, does not require a grand jury to be free of bias or prejudice or to proceed on competent evidence, see discussion, Part I, *supra*—the State must be doubly careful to provide an adequate procedure for ensuring a fair petit jury.

Forty States have given a defendant in a criminal case the right to conduct a *voir dire* examination of prospective jurors. See Appendix D hereto, *infra*, pp. 62-69. The nine other States, while withholding from a defendant the right to conduct the *voir dire* examination, appear either by statute or by practice to require the trial judge to ask relevant questions submitted by counsel (Appendix D hereto, *infra*, pp. 69-73.)

In the federal courts, the rule, as stated in the Rules of Criminal Procedure,[11] is similar to the Massachusetts statute. But in each of the following cases, the judgment of the lower court was reversed because the trial judge,

---

[11] Rule 24(a) of the *Federal Rules of Criminal Procedure* provides: "The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

who conducted the *voir dire* examination of jurors, refused to ask material questions proposed by counsel. *Morford* v. *United States*, 339 U.S. 258, 70 S. Ct. 586; *Aldridge* v. *United States*, 283 U.S. 308, 51 S. Ct. 470; *Sellers* v. *United States*, D.C. Cir., 271 F.2d 475; *Frasier* v. *United States*, 1 Cir., 267 F.2d 62. For further evidence of the universal belief in the federal courts that fairness requires an extensive *voir dire* examination of jurors in an appropriate case, see *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 76 S. Ct. 965; *Holt* v. *United States*, 218 U.S. 245, 31 S. Ct. 2; *Reynolds* v. *United States*, 98 U.S. 145, 25 Law Ed. 244; *United States* v. *Clancy*, 7 Cir., 276 F.2d 617; *Wagner* v. *United States*, 9 Cir., 264 F.2d 524, *cert. denied*, 360 U.S. 936, 79 S. Ct. 1459; *Spells* v. *United States*, 5 Cir., 263 F.2d 609, *cert. denied*, 360 U.S. 920, 79 S. Ct. 1439; *Chavez* v. *United States*, 10 Cir., 258 F.2d 816, *cert. denied*, 359 U.S. 916, 79 S. Ct. 592; *Judich* v. *United States*, 5 Cir., 214 F.2d 950; *Delaney* v. *United States*, 1 Cir., 199 F.2d 107; *Paschen* v. *United States*, 7 Cir., 70 F.2d 491, 495. Massachusetts, on the other hand, is the only state which in practice not only denies a defendant the opportunity to conduct a *voir dire* examination of prospective jurors, but sanctions, as within the powers of discretion, the limitation of the questions put by the trial judge to those required by statute.

The trial judge here did in some instances ask questions in addition to the four required by the statute. The Supreme Judicial Court held that, "In all respects the judge was meticulous to insure the empanelling of a jury free from bias." 1964 Mass. Adv. Sh. at 1159, 201 N.E. 2d at 508, Appendix A *infra*, p. 1159.

Petitioners believe, however, that an examination of the questions put to prospective jurors by the trial judge reveals that the questioning was at best superficial. Certainly it was not designed to, and could not, bring to light any hidden bias or prejudice harbored by a venireman,

instilled by the pre-trial publicity. See *Irvin* v. *Dowd*, 366 U.S. 717, 81 S. Ct. 1639.[12]

The trial judge, in fact, went beyond the statutory questions rarely, except in inquiring whether the prospective juror's health would interfere with his ability to serve.

Fortunately, the record provides an example of the importance of questioning the veniremen closely as to the effect that publicity has had on them, as counsel requested. (Tr. pp. 123-127.) Juror No. 385, Joseph Shulman, answered three of the four questions negatively. In addition, there appeared the following:

> "Q. Are you conscious or aware of the existence of any bias or prejudice on your part as to any of these three defendants?
>
> "A. No, I do not have any personal bias except what I have read in the newspaper."

The court then questioned the venireman more closely and discovered that he showed evidence of bias. The importance of this example is that had the juror not volunteered an answer not responsive to the question, his bias would never have been uncovered. The importance of the questions requested by petitioners' counsel as to the veniremen's exposure to publicity is thus demonstrated.

By refusing permission for petitioners to conduct the *voir dire* examination, and refusing to ask the questions listed in petitioners' motions for questions to each prospective juror, the trial judge precluded any adversary inquiry on a vital issue which he had to decide fairly if petitioners were to have a fair trial. Because the question of whether each juror was impartial was not tried "like any other issue of that character," the trial judge himself

---

[12] In the *Irvin* case, the defendant had the right, which he exercised, to examine jurors directly.

was duty bound to ask such questions as would seek fairly to elicit whether the jurors were actually able to "exclude even the unconscious influence of (their) . . . preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity." Instead, the questions which he asked merely sought to elicit whether the jurors thought they could be fair. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner(s), but psychological impact requiring such a declaration before one's fellows is often its father." *Irvin* v. *Dowd*, 366 U.S. 717, 728, 81 S. Ct. 1639, 1645.

The trial judge effectively denied petitioners the opportunity to prove bias. He barred them from attempting to prove what they had contended from the very beginning —that the prosecutors had issued, caused and stimulated substantial prejudicial pre-trial publicity, calculated and tending to convince the petit jury of petitioners' guilt, and to arouse that petit jury's animosity, indignation and prejudice towards and against petitioners. And he made no real effort to prove or put to rest their contention. Possibly, he thought that an expeditious *voir dire* examination was desirable and that it would be detrimental to the administration of criminal justice in Massachusetts to spend the time necessary for the type of *voir dire* examination sought by petitioners. But, as was said in *Aldridge* v. *United States*, 283 U.S. 308, 315, 51 S. Ct. 470, 473, "we think it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. *No surer way could be devised to bring the processes of justice into disrepute.*" (Italics supplied.) For just as the "*preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial trial*", *Dennis* v. *United States*, 339 U.S. 162, 171-172, 70 S. Ct. 519, 523, *so*

must the denial of such an opportunity constitute a denial of a fair trial, Cf. Morford v. *United States*, 339 U.S. 258, 70 S. Ct. 586. (Italics Supplied.)

The trial judge in the instant case denied petitioners the opportunity to prove bias and he himself asked few and unimaginative questions of the impanelled jurors. He was content in the belief that the standards imposed by the federal constitution would sanction conclusions of impartiality based upon a pedestrian examination in which petitioners' counsel were barred from participating. In petitioners' view, such an examination was constitutionally inadequate for determining whether the impanelled jurors were in fact impartial and indifferent; and its effect was to deny petitioners the due process of law guaranteed by the Fourteenth Amendment.

III. It Was a Violation of the Constitution of the United States for the Commonwealth to Convict Petitioners for Larceny When the Evidence Showed that the Larceny Was Committed Outside the Territorial Boundaries of the Commonwealth, Within the Jurisdiction of the State of New York.

The indictment returned against petitioners charging them with larceny, charged a larceny under Mass. G. L. (Ter. Ed.) C. 266, s. 30. The Government later filed a Bill Of Particulars specifying that the larceny was accomplished by means of false pretences.

The venue statute for general larceny is Mass. G. L. (Ter. Ed.) C. 277, s. 58, which provides that venue may lie, "in any county where the defendant had possession of the property alleged to have been stolen." There is another statute, C. 277, s. 59, which provides: "The crime of obtaining money . . . by a false pretence . . . may be alleged to have been committed, and may be prosecuted and

punished, in any county where the false pretence was made, written or used . . . by the defendant."

In 1905, the Supreme Judicial Court held that venue of an offense charged under the general larceny statute, as here, was governed solely by section 58. *Commonwealth* v. *Friedman*, 188 Mass. 308, 74 N.E. 464. Petitioners argued below that their motions for directed verdict should have been granted since: "In the instant case, the necessary asportation took place, and the larceny . . . was complete . . . in New York"; the money lost its identity when mingled in New York; and that even after the mingling, there was no evidence that the money ever found its way to Suffolk County or was possessed by petitioners in Suffolk County.[13] The Supreme Judicial Court, after fifty-nine years, reversed *Commonwealth* v. *Friedman*, 1964 Mass. Adv. Sh. at 1175-1177, 201 N.E. 2d at 517-518, Appendix A *infra*, pp. 1175-1177.

As a result of the new ruling, petitioners were convicted on the evidence that they had made false representations in Suffolk County, Massachusetts, with the intent to defraud (1964 Mass. Adv. Sh. at 1177-1178, 201 N.E. 2d at 518-519, Appendix A *infra*, pp. 1177-1178). But making false representations with intent to defraud is not a crime in Massachusetts. Petitioners were charged with and convicted of larceny, and the evidence was clear that the larceny took place in the State of New York.

There is a very clear line of cases defining when a sovereignty may take jurisdiction of a larceny. Each case has determined that jurisdiction lies in any place in which the thief has possession of the stolen property. The basis for this rule is that each moment of possession constitutes a new trespass against the original owner—a new asportation. *Commonwealth* v. *Andrews*, 2 Mass. 14, 21-23 (Opinion of Sedgwick, J.), 23-24 (Opinion of Dana, C. J.) (1806);

---

[13] Brief of Defendants Richard C. Simmers and Richard K. Gordon, pp. 34-36.

Commonwealth v. *Beaman*, 8 Gray (74 Mass.) 497 (1857), and cases cited therein; *Commonwealth* v. *Uprichard*, 3 Gray (69 Mass.) 434 (1855), and cases cited therein.

This theory, then, depends upon the thief's having in his possession the *identical* property stolen. *Commonwealth* v. *Beaman*, *supra*, and cases cited therein; *State* v. *Hedrick*, 272 Mo. 502; *Rainwater* v. *State*, 155 Miss. 684; *Grant* v. *State*, 42 Tex. Cr. 273; *Ballow* v. *State*, 42 Tex. Cr. 261, 263; 22 *C.J.S.*, Criminal Law s. 185 (18).

It is clear that in this case the property stolen lost its identity on March 2, 1960, when the $450,000.00 check was deposited in the account of the Foundation Company in the Chase Manhattan Bank in New York. *Accord*, *Burton* v. *United States*, 196 U.S. 283, 25 S. Ct. 243. No part of the proceeds of the original check could conceivably have reached Massachusetts before March 31, 1960, twenty-nine days later. Therefore, the larceny, for purposes of jurisdiction at least, took place in New York where the only trespass and asportation took place.[14]

This is not a case in which the petitioners can go free simply by stepping across the border to complete their crime. Compare *Commonwealth* v. *Welch*, 345 Mass. 366, 187 N.E. 2d 813 (1963). This is true, first, because they can be prosecuted in New York for larceny, second, because Massachusetts could well have outlawed the making

[14] The court below held that the Foundation Company served as a "cache" and a "conduit for the distribution of the funds", and that petitioners "accomplished with animus furandi the asportation of the funds both in New York and in Massachusetts." 1964 Mass. Adv. Sh. at 1172-1173, 201 N.E. 2d at 515-516, Appendix A *infra*, pp. 1172-1173. However, this was in connection with the point that the principal crime was not complete until the original plan was fully carried out. It was not in connection with the jurisdictional question. It should be noted that the last payment involved was a check dated March 31, 1961, more than one year after the original asportation, and that $140,000 of the proceeds of the $450,000 check was kept by the Foundation Company.

of false representations with intent to defraud if it had chosen to do so, and, third, because they were in fact convicted of conspiracy to commit larceny.

Although there is little direct law on this subject, it seems obvious that only chaos would result were states permitted to exercise police power over the territory of other states.[15] This is at least implicit in Article IV, section 2, clause 2 of the Constitution:

> "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed *to the State having jurisdiction of the Crime.*" (Emphasis added.)

The necessary inference to be drawn is that the State of refuge does not have jurisdiction of the crime committed in another State. This principle must have been recognized by the courts deciding the *Andrews, Beaman, Hedrick, Rainwater, Grant,* and *Ballow* cases, *supra.* See also *Magnolia Petroleum Co.* v. *Hunt,* 320 U.S. 430, 440, 64 S. Ct. 208, 214; *Home Insurance Co.* v. *Dick,* 281 U.S. 397, 50 S. Ct. 338; *New York Life Ins. Co.* v. *Head,* 234 U.S. 149, 34 S. Ct. 879.

Perhaps the earliest recorded expression of this principle in the United States was in the argument of one Otis, counsel for defendant, in *Commonwealth* v. *Andrews,* 2 Mass. 14, at 15 (1806). The principle was accepted by implication in that case and in *Commonwealth* v. *Beaman,* 8 Gray (74 Mass.) 497 (1857).

---

[15] "Laws to punish crimes are essentially local, and limited to the boundaries of the state prescribing them." *Commonwealth* v. *Uprichard, supra,* 3 Gray at 439. And see *Commonwealth* v. *Holder,* 9 Gray (75 Mass.) 7, 11 (dissenting opinion) (1857).

The *Beaman* case should have been controlling here. In that case, the defendant was charged with larceny of a peahen and a turkey. The court held that "the jury should have been instructed, as the defendants requested, 'that if the said fowls were alive when originally taken, from the possession of the owner in Connecticut, and were killed before being brought into this state, the defendants could not be convicted of stealing them in this state.'" 8 Gray at 499. When the property changed in identity, the asportation ceased (the court also held that live fowl were distinct from dead fowl), and no larceny took place in Massachusetts.

The court in the *Beaman* case must have decided that for purposes of jurisdiction the scope of the plot was irrelevant—only the places of trespass.

The crime charged was larceny. The larceny occurred in New York. The Massachusetts legislature could have made it a crime to make false pretences with intent to defraud, but it did not do so. To convict petitioners of the crime of making false pretences with intent to defraud would have violated the *ex post facto* clause of Article I, section 10, clause 1, of the Constitution. To convict them of larceny violated Article IV, section 2, clause 2.

Although petitioners in their brief below cited the *Beaman* case, and pointed out that the evidence showed that the larceny took place in New York, petitioners did not pursue this argument fully in the Court below because it was not relevant. Under *Commonwealth* v. *Friedman*, petitioners' convictions would have had to be reversed.[16] Certainly,

[16] It is clear that the Government's other arguments on this point were not accepted by the court. First, its argument that this prosecution was under c. 266, s. 33 (1) was countered by the court's saying that it was under section 30. 1964 Mass. Adv. Sh. at 1176, 201 N.E. 2d at 517, Appendix A, *infra*, p. 1176. Second, had the court been able to decide for the Government without reversing such a long-established case, it certainly would have done so.

petitioners were not required to argue against the overruling of each case which supported their position in order to save their rights. This is true especially since in Massachusetts the Government has no right to appeal in criminal cases.[17] *Commonwealth* v. *Cummings*, 3 Cush. (57 Mass.) 212 (1849). In addition, the court below did consider this point, and rejected it, when it considered and rejected petitioners' petition for rehearing of October 20, 1964. (Appendix E *infra*, pp. 74-78.)

IV. It Was a Violation of Petitioners' Constitutional Rights for the Court Below to Uphold Their Conviction by Overruling a Long-Established Rule of Law.

Had the court below not overruled *Commonwealth* v. *Friedman*, 188 Mass. 308, 74 N.E. 464 (1905), petitioners could not have been convicted of larceny in Massachusetts.

In *Calder* v. *Bull*, 3 Dall. 386, 1 L. Ed. 648, Justice Chase said that one of the four categories of violations of the *ex post facto* clause includes, "every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." In this case, prior to the decision of the court below, it was necessary for the evidence to show possession of the stolen property in Massachusetts, *Commonwealth* v. *Beaman*, 8 Gray (74 Mass.) 497 (1857), and in Suffolk County, *Commonwealth* v. *Friedman*, 188 Mass. 308, 74 N.E. 464 (1905). The decision of the court below made such evidence un-

---

[17] It is ironic that had the trial judge, who recognized that *Commonwealth* v. *Friedman* was controlling, granted petitioners' motions for directed verdicts as he properly should have done on the state of the evidence, the Government could not have raised this point at all.

necessary. The court held that the decision in the *Friedman* case (and, by implication, that in the *Beaman* case) was incorrect, and that the evidence need only show the making of a false pretence in Suffolk County. That the decision of a court can amount to *ex post facto* law-making was affirmed in *Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697. And the fact that the court merely "corrected" an earlier decision should make no difference. From 1905 to 1964 the law was that of the *Friedman* case. And the change was clearly not foreseeable.

In *Gut* v. *State of Minnesota*, 9 Wall. 37, the Court held that a change of venue did not constitute an *ex post facto* law. However, it was clear from the facts of that case that no substantial harm was done to the defendant by that change. And in *Cook* v. *United States*, 138 U.S. 157, 183, 11 S. Ct. 268, 275, the Court held that the change in venue was not a violation of the *ex post facto* clause when it merely changed the district in which trial was to be held, and when both the prior and new districts were within the jurisdiction of the same government. And no harm was shown to have been done to defendant by the change.

In *Beazell* v. *State of Ohio*, 269 U.S. 167, 46 S. Ct. 68, the court said that there are alterations of procedure that "will be held to be of sufficient moment to transgress the constitutional prohibition." 269 U.S. at 171, 46 S. Ct. at 69. Here, not only is there substantial harm to the defendant by the change of the venue rule, but in addition there is the change of jurisdictional requirement. This was not a question of in which county in Massachusetts venue lay, but whether venue lay in Massachusetts at all.

Moreover, the change in law, occurring not only after the alleged offense, but after trial, deprived petitioners of a fair trial. Trial counsel, believing that the Government had to prove possession in Suffolk County, may well have conducted his case in a substantially different manner had

the new rule been in effect at that time. Petitioners should at least be awared a new trial for that reason. Changing the governing rule of law after trial constituted a denial of due process of law under the Fourteenth Amendment as well as a violation of the *ex post facto* clause of the Constitution.

V. The Court Below Violated Petitioners' Rights Under the Ex Post Facto Clause of the Constitution, and Their Constitutional Rights to Due Process of Law by Affirming Their Convictions When There Was Insufficient Evidence to Prove the Charges Against Them.

A. *The Charge Was In Reality Accepting A Bribe For Which Petitioners Could Not Be Constitutionally Convicted*

This was a case in which the head of the Massachusetts Parking Authority received a kickback from the contractor who received the contract to build the parking garage under the Boston Common. Were the Authority a private corporation, this would have constituted a breach of fiduciary duty. But since the Authority was a public body, it constituted accepting a bribe. A public official who was guilty of accepting a kickback would normally have been prosecuted under the bribery statute. Mass. G.L. (Ter. Ed.) C. 268, secs. 8, 9 (1961). (Appendix C *infra*, pp. 57-59.) However, either through legislative oversight or because the Authority was privately financed, the officials of the Authority could not be reached under the statutes as they then stood. The Massachusetts legislature has since amended the statutes to include such officials explicitly. Mass. St. 1962, C. 779, Mass. G.L. C. 268 A, ss. 1 *et seq.* (Appendix C *infra*, pp. 59-61.)

But since Brady's alleged conduct, with petitioners' alleged help, was so outrageous to public opinion, the Government here attempted to make the acceptance of a bribe into a larceny. Convicting petitioners at all when their "crime" was not included in C. 268, secs. 8, 9 (1961), was a violation of the *ex post facto* clause of the Constitution. The violation would have been obvious had the charge been brought specifically under those sections. The result should be no different merely because the charges were brought in the words of another statute.

A further result of this attempt was that the evidence did not quite fit the form into which the Government attempted to pour it, as the following sections demonstrate.

B. *There Was Insufficient Evidence To Prove That Petitioners Had Any Intent To Commit Larceny Or Joined In A Conspiracy To Commit Larceny.*

The court below held that,

> "Although the evidence as to Simmers and Gordon discloses no overt act by them until after First National, relying on the fraudulently induced requisition of the Authority, had transferred the $450,000 from the Authority's construction fund to Foundation, it shows that thereafter their roles, clearly inferable as being the result of careful prearrangement, were important in completing the larceny." 1964 Mass. Adv. Sh. at 1172, 201 N.E. 2d at 515, Appendix A *infra*, p. 1172.

The evidence does not support the conclusion of the court below. The evidence shows clearly that although the plot was carefully prearranged, petitioners' part in it was not prearranged. Quite to the contrary, petitioners were

brought in to replace Broderick, and the earliest date this could possibly have taken place was March 24, 1960, three weeks after the larceny took place.

At this point, the money was already in the hands of Foundation Company. Petitioners' part in the later transactions did not in any way require that they know how the Foundation Company received the funds. For all petitioners knew, they were participating in an extortion from Foundation Company or were helping Foundation Company take the payment of a bribe as a deduction from its federal income tax.

At any rate, there was no evidence that "the precise false pretences and representations charged in the indictment (were) . . . made with (their) . . . knowledge, concurrence and direction," *Commonwealth* v. *Harley*, 7 Metc. 462, 466 (Mass.), or that they were present when those false statements were made, *cf. Commonwealth* v. *Mannos*, 311 Mass. 94, 40 N.E. 2d 291, 300. Therefore, their convictions violated the due process clause of the Fourteenth Amendment. *Fields* v. *City of Fairfield*, 375 U.S. 248, 84 S. Ct. 360; *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248; *Thompson* v. *Luisville*, 362 U.S. 199, 80 S. Ct. 624.

C. *There Was Insufficient Evidence To Prove That The Massachusetts Parking Authority Believed The Truth Of And Relied Upon The Allegedly False Statements.*

Essential for a conviction was proof beyond a reasonable doubt that the Authority relied upon the allegedly false statements "as true and parted with personal property as a result of such reliance." *Commonwealth* v. *Green*, 326 Mass. 344, 347-348, 94 N.E. 2d 260, 263; *Commonwealth* v. *Orler*, 252 Mass. 55, 59-60, 147 N.E. 548, 549.

First, the Authority parted with no property. It merely authorized the First National Bank to part with property. Had the Bank been the agent of the Authority, there would be no question. See *Commonwealth* v. *Call*, 21 Pick. 515, 520 (Mass.) But the Bank, acting as Trustee, had an interest adverse to that of the Authority and could not possibly be considered its agent.

The court below avoided this problem by changing the law once again. Instead of the requirement that "the person to whom [the false pretence] . . . was made . . . rely upon it as true and [part] . . . with personal property as a result of such reliance," the court substituted the law of Kentucky that as a result of the false pretence, money was obtained. 1964 Mass. Adv. Sh. at 1171-1172, 201 N.E. 2d at 515, Appendix A *infra*, pp. 1171-1172. No prior Massachusetts case can be found in which a court upheld a conviction for larceny of money the property of one person upon the basis of proof that another, not the agent of the first, parted with money in reliance upon the false pretences. This change in the law constituted a violation of the *ex post facto* clause of the Constitution.

In addition, the change constituted a denial of a fair trial, for petitioners' trial counsel might well have tried the case differently under the new ruling.

Second, the proof was insufficient to show that the Authority relied on any false statements at all. Although the knowledge of a faithless agent is not attributable to his principal, and an agent can defraud his principal, *Commonwealth* v. *Mulrey*, 170 Mass. 103, 106, 49 N.E. 91, there must be proof that the principal was indeed defrauded.

The Massachusetts Parking Authority was not a large organization. It would have been simple for the Government to put on the stand every one of its members (except, of course, the defendant Brady), agents and employees. But not one person connected with the Authority was asked

to testify as to whether he was deceived by the false statements and relied upon them.

In fact, all of the false statements were contained in documents signed by Brady and Kiernan and ratified or actually signed by the other two members of the Authority, the only persons who had the power to be deceived for the Authority. The result is the anomalous fact that it is those who made the statements who are said to be deceived by them.

Although the Authority has a theoretical existence apart from its members and employees, it cannot know, rely, or be deceived except through human beings. The Government offered no proof that anyone was so deceived. It cannot be said that this is the necessary implication from the fact that Requisition No. 1 was turned over to the Trustee. For the Authority was not itself defrauded by this payment. It was the bondholders or creditors of the Authority who were defrauded. And although it might be maintained that theoretically a corporate body cannot defraud itself, and so must have innocently relied on a false pretence, it cannot be maintained that a corporate body cannot defraud its creditors.

In addition, if any ability to know is to be attributed to the Authority, it must be admitted that the Authority must have known that no contractor would spend $450,000 before assurance that it would be awarded the contract. And knowing this, the Authority could not have been deceived.

Since there was insufficient evidence to prove this element of the offense, petitioners' convictions violated their rights under the due process clause of the Fourteenth Amendment. *Fields* v. *City of Fairfield*, 375 U.S. 248, 84 S. Ct. 360; *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248; *Thompson* v. *Louisville*, 362 U.S. 199, 80 S. Ct. 624.

D. *There Was Insufficient Evidence to Prove That the Massachusetts Parking Authority Had Either Possession or Constructive Possession of, or a General or Special Property Interest in, the Money Allegedly Stolen*

In the absence of evidence that the Authority had "actual or constructive possession or the general or special property in" the money alleged to have been stolen, G.L. (Ter. Ed.) C. 278, s. 9, the petitioners' motions for directed verdicts of not guilty should have been granted. *E.g., Commonwealth* v. *Morse,* 14 Mass. 216, 217-218 (1817).

The court below held that the Authority had "a special property . . . in the construction fund." 1964 Mass. Adv. Sh. at 1173-1175, 201 N.E. 2d at 516-517, Appendix A *infra,* pp. 1173-1175. It is apparent, however, that under the law as it existed up until the decision of the court below, the Authority did not have such an interest.

Over the years, four interests have usually been held to constitute a "special interest" in property. They are (1) the interest of an attaching officer, *Magaw* v. *Beals,* 272 Mass. 334, 172 N.E. 347; *Guttentag* v. *Huntley,* 245 Mass. 212, 139 N.E. 501; *McArthur Co.* v. *Beals,* 243 Mass. 449, 137 N.E. 697; *Mills* v. *Sullivan,* 222 Mass. 587, 111 N.E. 605; *Farrington* v. *Edgerly,* 13 Allen 453; *Commonwealth* v. *Morse,* 14 Mass. 216; *Ladd* v. *North,* 2 Mass. 513; (2) the interest of a lienor, *Michigan State Bank* v. *Gardner,* 15 Gray 362; (3) the interest of a pledgee, *Associates Discount Corporation* v. *C. E. Fay Co.,* 307 Mass. 577, 580, 30 N.E. 2d 876, 879; *Harding* v. *Eldridge,* 186 Mass. 39, 42, 71 N.E. 115; *Thompson* v. *Dolliver,* 132 Mass. 103; and (4) the interest of a bailee, *Nash* v. *Lang,* 268 Mass. 407, 414, 167 N.E. 762, 765. Other interests held to be a "special interest" may be found in 52 C.J.S., *Larceny,* s. 81; 32 Am. Jur., *Larceny,* s. 113.

Common to *all* species of special interests were two prerequisites: first that the holder of such an interest have either actual possession or the right to immediate possession; and second, that he have the right to detain the property against the general owner, even though his special interest is subordinate to that of the general owner. 73 C.J.S., Property s. 1(c). Holmes considered "special property" to have little or no significance beyond that of possession. Holmes, *The Common Law*, 242-244 (Little, Brown and Co. 1881). Here the Authority had neither actual nor constructive possession,[18] nor the right to detain the money

---

[18] That the Authority did not have actual possession of the money, which was on deposit in a general account of the First National Bank of Boston in the Chemical Bank New York Trust Company, requires little citation of authority. Cf. *New England Box Co.* v. *C. & R. Constr. Co.*, 313 Mass. 696, 707-711, 49 N.E. 2d 121, 128-130, and cases cited.

That the Authority did not have constructive possession is equally clear:

A person has constructive possession of specific, identifiable property only when he has the right to immediate, actual possession of the same property and the present ability to obtain possession of it. *Commonwealth* v. *Binkiewicz*, 342 Mass. 740, 175 N.E. 2d 474; *Commonwealth* v. *Conroy*, 333 Mass. 755, 133 N.E. 2d 246; *Commonwealth* v. *Cataldo*, 326 Mass. 377, 94 N.E. 2d 761; *Commonwealth* v. *Tilley*, 306 Mass. 402, 28 N.E. 245; *Commonwealth* v. *Anderson*, 245 Mass. 187, 139 N.E. 436; *Commonwealth* v. *Johnson*, 199 Mass. 62, 85 N.E. 188; *Commonwealth* v. *Conlin*, 188 Mass. 282, 74 N.E. 351; *Commonwealth* v. *Lawless*, 103 Mass. 425; *Commonwealth* v. *Tivnon*, 8 Gray 375; 73 C.J.S., *Property*, s. 14. In the leading case of *Commonwealth* v. *Tivnon*, *supra*, the court cited as examples of constructive possession (a) actual possession in an agent or servant, (b) actual possession in a co-owner, or (c) access to the property at pleasure.

None of those criteria will serve to support or sustain a finding that the Authority had constructive possession of the money allegedly stolen. Apart from the obvious fact that the Construction Fund Trustee (the First National Bank of Boston) was neither an agent or servant of, nor co-owner with, the Authority, the Authority never had the right to the immediate, actual possession of specific, identifiable money or the present ability to obtain possession of it. Such a right or ability would have defeated the very purpose of Resolution No. 8, which expressly provided that the proceeds realized from the sale of the bonds were to be "deposited with and held by the Construction Fund

allegedly stolen against the First National Bank of Boston,[19] and, consequently, the Authority did not even have a special interest in that money.

All that the Authority had was a contractual right to have the Construction Fund Trustee (the First National Bank of Boston) pay the "Cost of the Project." See Note, *Federal Legislation—Trust Indenture Act of 1939*, 28 Geo. L. J. 1084, 1085-1086 (1940). Such a right cannot be the subject of a larceny. *State* v. *Polzin*, 197 Wash. 612. Nor, assuming *arguendo* that Resolution No. 8 gave the Authority an equitable or reversionary interest, can the holder of such an interest be the person in whom ownership or possession may be laid in an indictment. 52 C.J.S., *Larceny* s. 81; 32 Am. Jur., *Larceny* s. 113; 2 Wharton *Criminal Law* s. 497 (1957 Ed.); Joyce, *Indictments* s. 427 (2nd Ed.); 2 Russell, *Crime* 1043 (10th Ed.).

The court below dismissed this argument by pointing out that the Authority had control over the spending of the money for the building of the garage, and cited two cases to support this theory. But never before has this contractual right to control been considered special property. In *Commonwealth* v. *McDonald*, 187 Mass. 581, 73 N.E.

Trustee . . . in trust and applied only for the payment of the Cost of the Project." (Ex. 6, pp. D-7, D-8; Tr. 325-326.)

As a result, the Authority did not have, any more than those who have checking accounts in the First National Bank of Boston, constructive possession of any of the funds in the possession of that bank. Cf. *Merchants' National Bank* v. *State Bank*, 10 Wall. 604, 641-643, 19 Law Ed. 1008, 1017-1018; *Wright* v. *Paine*, 62 Ala. 340; Brown, *Personal Property*, 277-278 (1955 Ed.).

[19] In fact, the Authority had no right to possession at all under Section 406 of the Trust Agreement (Resolution No. 8, Exhibit 6, pp. D-9, D-10; Tr. 326-329), part of which reads:

> "Upon receipt of each such requisition and all required accompanying certificates, the Construction Fund Trustee shall pay each such item from the Construction Fund *directly to the person entitled thereto* as named in such requisition, or shall deliver to the Authority a check or draft for the payment thereof payable to the order of said person." (Emphasis added.)

852 (1905), the person whose property was alleged to have been stolen had the right to immediate possession of the money involved. He had merely given it to a temporary custodian to hold for him.

The other case cited by the court below to support its position was *Commonwealth* v. *Fitzgerald*, 164 Mass. 587, 42 N.E. 119 (1895). That case did not even involve a larceny. There the defendant was convicted of burning a bridge, the property of the county. The bridge was in the county, was built by the county, the county paid for a part of its upkeep, and the materials of the bridge would revert to the county when the bridge was no longer a part of the public way. The holding was that the bridge *qua* bridge was a public way, but that the materials of the bridge *qua* materials were the property of the county. This case does not support the court's theory.

The proof of property did not meet the allegation, and the conviction violated petitioners' rights under the Fourteenth Amendment to the Constitution. *Fields* v. *City of Fairfield*, 375 U.S. 248, 84 S. Ct. 360; *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248; *Thompson* v. *Louisville*, 362 U.S, 199, 80 S. Ct. 624. If the proof met the charge, it was only because the law was changed, in which case there was a violation of the *ex post facto* clause of the Constitution. *Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL T. SMITH
MANUEL KATZ
DANIEL KLUBOCK
209 Washington Street
Boston 8, Massachusetts
Attorneys for Petitioners

Appendix A

SEPARATELY BOUND

Appendix B

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION

Article I, section 10, clause 1, provides, so far as relevant:

> No State shall . . . pass any . . . ex post facto law. . . .

Article IV, section 2, clause 2, provides:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

The Fourteenth Amendment provides:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

MASSACHUSETTS CONSTITUTION

Declaration of Rights, Article 12 provides:

> ". . . And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

Appendix C

STATUTORY PROVISIONS

MASSACHUSETTS STATUTES

St. 1958, c. 606 provides in pertinent part as follows:

SECTION 2. *Definitions.* As used in this act, the following words and terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:—

(a) "Authority" shall mean the Massachusetts ing Parking Authority, created by section three of this act, . . .

(c) "Cost of the project" shall embrace the cost of preparing plans and specifications for, and constructing the garage, tunnel, and underground passageway, . . .

(i) "Trustee" shall mean the bank or trust company acting as trustee under the resolution whereby the revenue bonds herein provided for are issued by the Authority or under a trust agreement made and entered into by and between the Authority and a bank or trust company. . . .

SECTION 3. *Massachusetts Parking Authority.*—There is hereby created and placed in the state department of public works a body politic and corporate to be known as the "Massachusetts Parking Authority," which shall not be subject to the supervision and regulation of the department of public works or of any other department, commission, board, authority, bureau or agency of the commonwealth except to the extent and in the manner provided in this act. The Authority is hereby constituted a public instrumentality and the exercise by the Authority of the powers conferred by this act in the construction, operation and maintenance of the garage shall be deemed and held to be the performance of an essential governmental function.

The Massachusetts Parking Authority shall consist of three unpaid members, . . .

SECTION 5. *General Grant of Powers.*—The Authority is hereby authorized and empowered— . . .

(e) To prepare plans and specifications for, construct, reconstruct, extend, improve, insure, repair, maintain, operate or lease a garage under Boston Common for the parking and the servicing and repairing of motor vehicles, together with all necessary and convenient approaches to such garage above and below ground, including the underground passageway and the tunnel;

(f) To issue Common garage revenue bonds of the Authority, interim receipts, and temporary bonds, payable solely from revenues as hereinafter provided, and to refund its bonds, all as provided in this act; . . .

(l) To make and enter into all contracts, leases and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act, including leases with any person, partnership, association, or corporation for the operation of the project;

(m) To employ consulting engineers, accountants, attorneys, construction and financial experts, superintendents, managers and such other employees and agents as may be necessary in its judgment, and to fix their compensation, . . .

(p) To do all acts and things necessary or convenient to carry out the powers expressly granted in this act. . . .

SECTION 8. *Common Garage Revenue Bonds.*—The Authority is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of Common garage revenue bonds of the Authority for the purpose of paying all or any part of the cost of the project or any

part or parts thereof. The principal of and the interest on such bonds shall be payable solely from the funds herein provided for such payment. . . .

The Authority may sell such bonds in such manner, either at public or at private sale, and for such price, as it may determine to be for the best interests of the Authority.

The proceeds of the bonds shall be used solely for the payment of the cost of the project, and shall be disbursed in such manner and under such restrictions, if any, as the Authority may provide in the resolution authorizing the issuance of such bonds or in the trust agreement hereinafter mentioned securing the same. . . .

If the proceeds of the bonds shall exceed such cost, the surplus shall be deposited to the credit of the sinking fund for such bonds. . . .

SECTION 9. *Trust Agreement.*—In the discretion of the Authority, the bonds issued under the provisions of this act may be secured by a trust agreement by and between the Authority and a corporate trustee, which shall be any trust company or bank having the powers of a trust company within the commonwealth. Such trust agreement or the resolution providing for the issuance of such bonds may pledge or assign the fees and other revenues to be received, but shall not convey or mortgage the project or any part thereof. Such trust agreement or resolution providing for the issuance of such bonds may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the Authority in relation to the acquisition of property and the construction, improvement, maintenance, operation, leasing, repair and insurance of the project, the rates of fees to be charged, and the custody, safeguarding and application of all moneys, and may contain provision for the employment of consulting engineers in connection with the

construction and operation of the project. It shall be lawful for any bank or trust company incorporated under the laws of the commonwealth which may act as depositary of the proceeds of the bonds or of revenues to furnish such indemnifying bonds or to pledge such securities as may be required by the Authority. Such trust agreement or resolution shall set forth the rights and remedies of the bondholders and of the trustee, and may restrict the individual right of action by bondholders. In addition to the foregoing, such trust agreement or resolution may contain such other provisions as the Authority may deem reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as a part of the cost of operation of the project.

SECTION 10. *Revenues.*—The Authority is hereby authorized to fix, revise, charge and collect fees for the use of the project and the different parts or sections thereof, and for the servicing of motor vehicles including the making of minor repairs, and to contract with any person, partnership, association or corporation as to the lease of the project for the parking and servicing of motor vehicles including the making of minor repairs and as to the sale of gasoline, and other motor vehicle fuels, oils and accessories. Such fees and the proceeds of such lease and contracts shall be so fixed and adjusted in respect to the aggregate of revenue from the project as to provide a fund sufficient to pay (a) the administrative expenses of the Authority and the cost of insuring, repairing, maintaining, operating or leasing the project and all extensions and improvements thereto, and (b) the principal of and the interest on bonds issued under this act as the same shall become due and payable, and (c) to create reserves for such purposes. Such fees and such lease and contract shall not be subject to supervision or regulation by any department, division, commis-

sion, board, bureau or agency of the commonwealth or any political subdivision thereof. The fees and all revenues derived from leases and contracts, except such part thereof as may be necessary to pay such current expenses and to provide such reserves therefor as may be provided for in the resolutions authorizing the issuance of such bonds or in the trust agreement securing the same, and as may be necessary to meet any sinking fund requirements for the outstanding bonds, shall be set aside at such regular intervals as may be provided in such resolution or such trust agreement in a sinking fund which is hereby pledged to and charged with the payment of (1) The interest on such Common garage revenue bonds as such interest shall fall due; (2) The principal of such bonds as the same shall fall due; and (3) The redemption price or the purchase price of bonds retired by call or purchase as therein provided. Such pledge shall be valid and binding from the time when the pledge is made; the fees and other revenues or other moneys so pledged and thereafter received by the Authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lieu of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract, or otherwise against the Authority, irrespective of whether such parties have notice thereof. Neither the resolution nor any trust agreement by which a pledge is created need be filed or recorded except in the records of the Authority. The use and disposition of moneys to the credit of such sinking fund shall be subject to the provisions of the resolution authorizing the issuance of such bonds or of such trust agreement. Except as may otherwise be provided in such resolution or trust agreement, such sinking fund shall be a fund for all such bonds without distinction or priority of one over another.

SECTION 11. *Trust Funds.*—All moneys received pursuant to the authority of this act, whether as proceeds from the sale of Common garage revenue bonds or as revenues, shall be deemed to be trust funds to be held and applied solely as provided in this act. The resolution authorizing the issuance of bonds or the trust agreement securing such bonds shall provide that any officer with whom, or any bank or trust company with which, such moneys shall be deposited shall act as trustee of such moneys and shall hold and apply the same for the purposes hereof, subject to such regulations as this act and such resolution or trust agreement may provide.

SECTION 12. *Remedies.*—Any holder of bonds issued under the provisions of this act or of any of the coupons appertaining thereto, and the trustee under any trust agreement or resolution, except to the extent the rights herein given may be restricted by such trust agreement or resolution, may, either at law or in equity, by suit, action, mandamus or other proceeding, protect and enforce any and all rights under the laws of the commonwealth or granted hereunder or under such trust agreement or resolution authorizing the issuance of such bonds, and may enforce and compel the performance of all duties required by this act or by such trust agreement or resolution to be performed by the Authority or by any officer thereof, including the fixing, charging and collecting of fees . . . .

SECTION 18. *Preliminary Expenses.*—To provide for the preliminary expenses of the Authority in carrying out the provisions of this act, the sum of two hundred thousand dollars is hereby appropriated, which sum shall be paid to the Authority, and, simultaneously with the delivery of the bonds, the sum so paid shall be reimbursed by the Authority to the commonwealth out of the proceeds of any bonds which may be issued under the provisions of this act.

The Authority is hereby authorized and directed to make such surveys and studies of the project as may be necessary to effect the financing authorized by this act at the earliest practicable time and for this purpose to employ such consulting engineers, traffic engineers, legal and financial experts and such other employees and agents as it may deem necessary. . . .

G.L. (Ter. Ed.) c. 234, s. 28 provides:

> "Upon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; and the objecting party may introduce other competent evidence in support of the objection. If the court finds that the juror does not stand indifferent in the case, another shall be called in his stead."

G.L. (Ter. Ed.) c. 266, s. 30 provides in pertinent part:

> "(1) Whoever steals, or with intent to defraud obtains by a false pretence, or whoever unlawfully, and with intent to steal or embezzle, converts, or secretes with intent to convert, the property of another as defined in this section, whether such property is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall, if the value of the property stolen exceeds one hundred dollars, be punished by imprisonment in the state prison for not more than five years, or by a fine of not more than six hundred dollars and imprisonment in jail for not more than two years; . . ."

G.L. (Ter. Ed.) c. 268, s. 8 (1961) provided:

> "A legislative, executive, judicial, county or municipal

officer who corruptly requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to him, under an agreement or with an understanding that his vote, opinion or judgment shall be given in any particular manner, or upon a particular side of any question, cause or proceeding, which is or may be by law brought before him in his official capacity or as a consideration for any speech, work or service in connection therewith, or that, in such capacity, he shall make any particular nomination or appointment, shall forfeit his office, be forever disqualified to hold any public office, trust or appointment under the constitution or laws of the commonwealth, and be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five thousand dollars and imprisonment in jail for not more than two years; and an executive, county other than judicial, or municipal officer who is finally convicted of committing, in connection with the performance of the duties of such office, the crime of larceny, embezzlement or obtaining money under false pretences shall, in addition to the penalty imposed by law for the punishment of such crime, forfeit his office and be forever disqualified to hold any public office, trust or appointment as aforesaid."

G.L. (Ter. Ed.) c. 268, s. 9 (1961) provided:

"An officer or agent of, or a person employed by, the commonwealth, or by a county, city, town, or by any public institution not mentioned in section twelve who, being authorized to procure materials, supplies or other articles either by purchase or contract, or to employ service or labor, receives, directly or indirectly, for himself or for another, a commission, discount, bonus, present or reward from the person who makes such contract, furnishes such materials, supplies or

other articles, or from a person who renders service or labor under such contract, and a person who gives or offers such commission, discount, bonus, present or reward, shall be punished by a fine of not less than ten nor more than five hundred dollars or by such fine and imprisonment for not more than one year."

MASS. ST. 1962, c. 779, G.L. (TER. ED.) c. 268A:

SECTION 1:

(p) "State agency", any department of state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department, *and any independent state authority*, district, commission, instrumentality or agency, but not an agency of a county, city or town. (Emphasis added.)

(q) "State employee", a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council, but excluding members of the judiciary, but not excluding any other officers and employees of the judicial department.

SECTION 2:

(b) "Whoever, being a state, county or municipal employee or a member of the judiciary or a person selected to be such an employee or member of the judiciary, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for

(1) being influenced in his performance of any official act or any act within his official responsibility, or

(2) being influenced to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud, on the commonwealth or on a state, county or municipal agency, or

(3) being induced to do or omit to do any acts in violation of his official duty;

(d) . . . shall be punished by a fine of not more than five thousand dollars or by imprisonment in the state prison for not more than three years or in a jail or house of correction for not more than two and one half years, or by both such fine and imprisonment in a jail or house of correction; and in the event of final conviction shall be incapable of holding any office of honor, trust or profit under the commonwealth or under any state, county or municipal agency.

SECTION 3:

(b) Whoever, being a present or former state, county or municipal employee or member of the judiciary, or person selected to be such an employee or member of the judiciary, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him;

(d) . . . shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

SECTION 4:

(a) No state employee shall otherwise than as pro-

vided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.

Whoever violates any provision of this section shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years or both.

G.L. (Ter. Ed.) c. 277, s. 58 provides:

"Larceny, whether at common law or as defined by section thirty of chapter two hundred and sixty-six, may be prosecuted and punished in any county where the defendant has possession of the property alleged to have been stolen."

G.L. (Ter. Ed.) c. 277, s. 59 provides:

"The crime of obtaining money or a personal chattel by a false pretence, and the crime described in section thirty-one of chapter two hundred and sixty-six , may be alleged to have been committed, and may be prosecuted and punished, in any county where the false pretence was made, written or used, or in or through which any of the property obtained was carried, sent, transported or received by the defendant."

G.L. (Ter. Ed.) c. 278, s. 9 provides:

"In the prosecution of crimes which relate to or affect real or personal estate, it shall be sufficient, and shall not be a variance, if it is proved on the trial that, at the time when the crime was committed, either the actual or constructive possession or the general or special property in the whole or any part of such real or personal estate was in the person or community alleged to be the owner thereof."

Appendix D

How Other States Provide a Defendant with the Opportunity to Prove Prejudice on the Part of Jurors

Forty States in Which by Statute, Rule or Judicial Decision a Defendant Has the Right to Examine Prospective Jurors[1]

1. Ala. Code tit. 30, sec. 52 (1940) provides that "either party shall have the right to examine jurors . . . ." In *Jackson* v. *McFadden*, 260 Ala. 109, 69 So. 2d 286, the right to examine prospective jurors was recognized, although counsel was held to have waived his right.

2. Alaska Compiled Laws, sec. 55-7-41 (1949) provides that in civil and criminal cases, "jurors shall be examined as to their qualifications first by the plaintiff and then by the defendant."

3. Ariz. Supreme Court Rule 217 reads: "Either party may question the jurors."

4. Ark. Stat. sec. 39-226 (1947) reads: "The court shall examine all prospective jurors under oath upon all matters set forth in the statutes as disqualifications. Further questions may be asked by the Court, or by the attorneys in the case, in the discretion of the Court." In spite of this statute, Arkansas courts recognize a lawyer's right to examine jurors. *In Missouri Pac. Transp. Co.* v. *Johnson*, 197 Ark. 1129, 126 S.W. 2d 931, the trial court offered to ask the jurors any questions that defendant's lawyer might suggest. Still, the appellate court reversed solely because the trial judge did not allow defendant's attorney to examine each juror directly. In *Sorrentino* v. *State*, 214 Ark. 115, 119, 214 S.W. 2d 517, 520, the court said: "Appellant had a right to inquire into the attitude of the prospective juror. . . ."

---

[1] Some civil cases are cited, but only where states do not distinguish between civil and criminal voir dire examinations.

5. Cal. Penal Code sec. 1078 (Deering's 1959) requires that the "trial court . . . shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant." In *People* v. *Coen*, 205 Cal. 596, 605-606, 271 Pac. 1074, 1078, defendant's counsel sought to ask the prospective jurors whether they had read various newspaper articles about the case. The appellate court stated that "the trial court unduly restricted the examination" by disallowing the questions concerning newspaper publicity, but held that defendant's rights were lost by waiver.

6. *Zancannelli* v. *People*, 63 Colo. 252, 260, 165 Pac. 612, 614, holds that "the defendant had a right to propound questions to the proposed jurors . . . ."

7. Conn. Gen. Stat. sec. 51-240 (1958) provides that "either party may examine each juror . . . ."

8. Fla. Stat. sec. 54.13 (1959) provides that "the respective parties" shall "have the right to orally examine jurors upon their voir dire."

9. Ga. L. 1951, p. 216 and L. 1959, p. 1083 provide that "both the State and the defendant shall have the right to an individual examination of each juror . . . ."

10. Hawaii R.L. sec. 231-10 (1955) reads: "Either party shall have the right to examine a proposed juror . . . ."

11. In *State* v. *Hoagland*, 39 Idaho 405, 228 Pac. 314 the appellate court assumed counsel's right to ask relevant questions. *State* v. *Healey*, 45 Idaho 73, 260 Pac. 694, is another example of Idaho's custom of allowing counsel to examine jurors.

12. Ill. R.S. c. 110, sec. 101.24-1 (1959) reads: "The parties or their attorneys shall be allowed a reasonable opportunity to supplement (the judge's) examination . . ." In *Donovan* v. *People*, 139 Ill. 412, 28 N.E. 964, the trial judge offered to ask the jurors questions if defense counsel would suggest them, the conviction was reversed because defense counsel was not given an opportunity to ask the

questions directly. Similarly, in *People* v. *DeLordo*, 350 Ill. 148, 151-152, 182 N.E. 726, 728, the conviction was reversed because defense counsel was not given an opportunity to examine the jurors; the trial court's error "deprived the defendants of a fair and impartial trial."

13. *Roby* v. *State*, 215 Ind. 55, 17 N.E. 2d 800, assumes that in accord with Indiana practice, there will be some examination by defendant's counsel, as does *Epps* v. *State*, 102 Ind. 539, 1 N.E. 491. There is a "right in examining prospective jurors to ask any questions pertinent to the issue (which tends) to elicit information upon which to base a challenge, either peremptory or for cause." *Baker* v. *State*, 190 Ind. 385, 395, 129 N.E. 468, 472.

14. In Iowa counsel have an opportunity for "cross-examination" of prospective jurors. *State* v. *Rhodes*, 227 Ia. 332, 335, 288 N.W. 98, 100, *cert. denied*, 310 U.S. 626, 60 S. Ct. 980. Other examples of the Iowa custom permitting counsel to examine prospective jurors directly are *State* v. *Harrington*, 220 Ia. 1116, 264 N.W. 24, and *State* v. *Wheelock*, 218 Ia. 178, 254 N.W. 313.

15. *State* v. *Maxwell*, 151 Kan. 951, 956, 102 P. 2d 109, 113, recognizes counsel's "right to interrogate jurors."

16. In *Lightfoot* v. *Commonwealth*, 310 Ky. 151, 159, 219 S.W. 2d 984, 989, it was held that a "litigant is entitled to make inquiry of jurors in respect to any matter which will throw light on the background of the juror . . . ." Another Kentucky case where defense counsel examined prospective jurors is *Tarrance* v. *Commonwealth*, 265 S.W. 2d 40, *cert. denied*, 348 U.S. 899, 75 S. Ct. 220.

17. La. R.S. tit. 15, sec. 349 (1950) reads: "Examination of prospective jurors shall be conducted in the manner as now provided by existing laws." *State* v. *Guidry*, 160 La. 655, 656-659, 107 So. 479, 480-481, reveals that "manner". There the court reversed a conviction because counsel was not allowed to examine prospective jurors directly, though

the trial judge permitted counsel to suggest questions for the judge to ask, saying: "Article 1, sec. 9 of the (state) Constitution guarantees the right of a person accused of crime to a speedly public trial by an impartial jury." The trial judge's willingness to re-state questions proposed by defendant's counsel did not cure the defect. "By repetition the questions lose their force and value," and the examination "becomes as unsatisfactory as the examination of a foreign witness by the aid of interpreter."

18. Minn. Stat. sec. 631.26 (1953) provides that "either party may examine (a prospective juror) . . . ." *State* v. *Baner*, 189 Minn. 280, 281, 249 N.W. 40 states: "Litigants in a case, criminal or civil, are entitled to a fair, competent, and impartial jury. They should have the opportunity on the voir dire examination of the prospective jurors to ascertain . . . any bias they may entertain concerning the subject matter of action."

19. Miss. Code sec. 1802 (1942) reads: "The parties or their attorneys in all jury trials shall have the right to question jurors . . . and it shall not be necessary to propound the questions through the presiding judge, but they may be asked by the attorneys . . . ."

20. *State* v. *Dill*, Mo., 282 S.W. 2d 456, assumes counsel's right to examine jurors. Missouri cases where parties examined prospective jurors directly include *State* v. *Malone*, Mo., 301 S.W. 2d 750; *McCollum* v. *Executive Aircraft*, 291 S.W. 2d 650; *State* v. *Hoffman*, 344 Mo. 94, 125 S.W. 2d 55; *Harris* v. *St. Louis-San Francisco Ry. Co.*, 60 S.W. 2d 652.

21. In *State* v. *Brooks*, 57 Mont. 480, 486, 188 Pac. 942, 943, the conviction was reversed because of the trial court's limiting of defendant's questioning of prospective jurors. "The voir dire examination of jurors is a right secured to the defendant . . . ."

22. *Oden* v. *State*, 166 Neb. 729, 730, 735, 90 N.W. 2d 356, 357, 360, recognizes a defendant's "right to have his

counsel personally conduct a voire dire examination" as "uniformly and customarily practiced," and kept in force by Neb. R.S. sec. 25-1106 (1943), which provides: "The general mode of summoning, impanelling, challenging and swearing the jury is not changed by this code."

23. *State* v. *McNeil*, 53 Nev. 428, 440, 4 P. 2d 880, 892, labels counsel's examining jurors as "cross-examination". Other Nevada cases which assume that defendant's counsel can examine prospective jurors include *State* v. *Casey*, 34 Nev. 154, 117 Pac. 5; *Bryant* v. *State*, 72 Nev. 330, 305 P. 3d 360; *State* v. *Shaddock*, Nev. 344 P.2d 191.

24, N.J. Stat. 2A: 78-4 (1951) provides that "all parties may, within the discretion of the court, question any person summonsed as a juror . . . ." N.J. Criminal Practice Rule 3:7-2 (b) provides that questions "shall be permitted, within the discretion of the court." *Springdale Park, Inc.* v. *Andriotis*, 30 N.J. Super 257, 104 A. 2d 327, indicates that the trial judge's discretion does not extend so far as to permit the elemination of direct examination by counsel. "That a party to litigation may examine into the qualifications, attitudes and inclinations of jurors . . . is unquestioned," 30) N.J. Super. at 262, 104 A. 2d at 330. "A wide latitude is allowed counsel in examining on the *voir dire.*" *State* v. *Grillo*, 16 N.J. 103, 110, 106 A.2d 294, 298.

25. *State* v. *Douthitt*, 26 N.M. 533, 535-536, 194 Pac. 879, states that "the rule in this state, as in the majority of the United States, is that the defendant in a criminal case is entitled to make reasonable and pertinent inquiries of a juror on his voir dire . . ."

26. In New York, "it is the right of every litigant . . . to interrogate the jurors drawn," *Fortune* v. *Trainor*, 19 N.Y. Supp. 598 ,599. In *People* v. *Hosier*, 132 App. Div. 146, 116 N.Y. Supp. 911, *aff'd*, 196 N.Y. 506, 89 N.E. 1107, the conviction was reversed, the court holding that the defendant "was entitled to a reasonable examination of

each proposed juror," 132 App. Div. at 150, 116 N.Y. Supp. at 914. Other New York cases recognizing a defendant's right to examine prospective jurors include *People* v. *Jelke*, 284 App. Div. 211, 130 N.Y. S. 2d 662, *aff'd*, 308 N.Y. 56, 123 N.E. 2d 769; *People* v. *Winship*, 309 N.Y. 311, 130 N.E. 2d 634; *People* v. *Rendigs*, 123 Misc. Rep. 32, 205 N.Y. Supp. 133. In *Fischer* v. *Brooklyn Heights R. Co.*, 84 N.Y. Supp. 254, the court held that the right to examine the prospective jurors had been waived.

27. N.C. Gen. Stat. sec. 9-15 (1953) permits "any party" to "make inquiry as to the fitness and competency of any person to serve as a juror." "This section provides and gives the right to the State or to the defendant to inquire of the juror as to his fitness and competency to serve . . . ." *State* v. *Ashburn*, 187 N.C. 717, 721, 122 S.E. 833, 834.

28. N.D. Rev. Code sec. 29-1728 (1943) provides that "Either party . . . may examine the jurors . . . ."

29. Ohio Rev. Code sec. 2945.27 (Baldwin's 1958) reads: "The judge of the trial court . . . shall permit reasonable examination of such jurors by the prosecuting attorney and by the defendant . . . ."

30. *Kiser* v. *State*, 67 Okl. Cr. 16, 67, 68, 93 P. 2d 58, 87, 88, recognizes the "right" to examine jurors.

31. Ore. R.S. sec. 17.160 (1957) provides that jurors "shall . . . be examined as to their qualifications, first by the plaintiff, then by the defendant."

32. *Commonwealth* v. *Deysher*, 139 Pa. Super. 497, 500, 12 A. 2d 492, 493, refers to the defendant's "right to examine the prospective jurors under oath." Some cases permitting questioning by defense counsel are *Commonwealth* v. *Figari*, 166 Pa. Super. 169, 70 A. 2d 666; *Commonwealth* v. *Greenberg*, 143 Pa. Super .203, 17 A. 2d 698.

33. South Dakota cases assuming counsel's right to question jurors within reasonable limits include *State* v. *Krutzeldt*, 5 S.D. 435, 221 N.W. 53; *State* v. *Chapman*,

1 S.D. 414, 47 N.W. 411; and *State* v. *Mitchell*, 46 S.D. 272, 192 N.W. 487.

34. In Tennessee, "it is the right of the litigant to subject to a rigid examination every man presented to him as a juror . . . ." *Paducah, T. & A. R. Co.* v. *Muzzell*, 95 Tenn. 200, 31 S.W. 999, 1000. The "questions asked by the attorneys are within the discretion of the *attorneys*," *Long* v. *State*, 187 Tenn. 139, 213 S.W. 2d 37, 40. (Italics supplied.)

35. In Texas, "it is the well established rule of law" that an accused may question jurors. *Livingston* v. *State*, 152 Tex. Crim. App. 302, 306, 214 S.W. 2d 119, 121.

36. *State* v. *Turley*, 87 Vt. 163, 88 Atl. 562, reveals the Vermont practice of allowing examination by counsel, as does *Parker* v *.Hoefer*, 118 Vt. 1, 100 A. 2d 434.

37. Wash. Rev. Code sec. 4.44.210 (1951) provides that prospective jurors are "examined as to their qualifications, first by the plaintiff and then by the defendant. Sec. 10.49.020 makes his section applicable to criminal trials.

38. W. Va. Code sec. 5646 (1955): "Either party . . . may . . . examine on oath any person who is called as a juror."

39. Wis. Stat. sec. 270.16 (1957) recognizes "the right of either party . . . to examine any (prospective juror)". Sec. 957.14 makes sec. 270.16 applicable to criminal cases.

40. In Wyoming, "litigants should be given reasonable opportunity to make inquiries" of jurors, so that counsel may "secure the impartial and disinterested jury which the law contemplates." *Eggan* . *O'Malley*, 45 Wyo. 505, 511, 21 P. 2d 821, 822. Counsel propound the "interrogatories under our state practice." 45 Wyo. at 513, 21 P. 2d at 823. Other examples of the Wyoming practice permitting counsel to examine prospective jurors directly are *Loy* v. *State*,

26 Wyo. 381, 185 Pac. 796; *Johnson* v. *State*, 29 Wyo. 121, 211 Pac. 484; *Starke* v. *State*, 17 Wyo. 55, 96 Pac. 148.

THE OTHER TEN STATES

1. Del. Super. Ct. (Crim.) Rule 24(a) provides: ". . . the court shall permit or conduct such examination as is reasonably calculated to ascertain prejudice of a juror." If the court conducts the examination, "the court shall permit the defendant or his attorney and the Attorney General to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper." The Delaware rule provides for an even more comprehensive examination than that of the federal courts: "The Delaware Rule on examination of trial jurors is broader than the Federal Rule in that it requires the court to 'permit or conduct such examination as is reasonably calculated to ascertain prejudice of a juror.'" Hermann, *The New Rules of Procedure in Delaware*, 18 F.R.D. 327, 332.

2. Me. R.S. c. 113, sec. 101 (1954) provides: "The court, on motion of either party in a suit, may examine, on oath, any person called as a juror therein, whether he is related to either party, has given or ofrmed an opinion or is sensible of any bias, prejudice or particular interest in the cause . . . ." *State* v. *Knight*, 43 Me. 11, 114-115, holds that this section applies to criminal trials. But Maine voir dire examinations are not limited to the questions specfied in the statute. See, e.g. *State* v. *Albano*, 119 Me. 472, 111 Atl. 753.

3. *Bryant* v. *State*, 207 Md. 565, 583, 115 R. 2d 502, 510 recognizes "the right to discover the juror's state of mind in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him," though the court upheld the trial judge's refusal to ask whether a

juror had ever been a client of either of the state's attorneys.

In *Brown* v. *State* 220 Md. 29, 33, 34, 150 A. 2d 895, 897, the court upheld the trial judge's refusal to ask "whether the jurors had read or heard any accounts of the case in the newspapers or on the radio or television, and whether they had discussed the guilt or innocence of the accused," but reversed, because of the prejudice to the appellant from the failure of the trial court to examine the jurors as to possible racial prejudice. Maryland has no specific rule as to what questions are to be asked on voir dire, *Bryant* v. *State*, 207 Md. at 583, 115 A. 2d at 510. The trial judge cannot relieve himself of his obligations by asking a few general questions. The particular facts involved determine what questions are necessary. With sufficiently massive publicity Maryland would perhaps require questions concerning newspaper articles, though in *Goldstein* v. *State*, 220 Md. 39, 150 A. 2d 900, involving convictions for suborning police officers to perjure themselves, the trial court's refusal to ask jurors about newspaper publicity concerning other matters than those for which the defendants were tried was upheld.

4. "As was said in *Commonwealth* v. *DiStasio*, 294 Mass. 273, 280, 'In this Commonwealth the examination of prospective jurors is "under the direction of the court," whether conducted by counsel, or, as is customary, by the judge. Seldom is it permitted to extend beyond the statutory questions. *Commonwealth* v. *Cero*, 264 Mass. 264, 279 271. Whether other questions shall be asked is discretionary with the judge. *Commonwealth* v. *Millen*, 289 Mass. 441, 475, 476'." *Commonwealth* v. *Geagan*, 339 Mass. 487, 159 N.E. 2d 870, 883, *cert. denied* 361 U.S. 895.

5. Mich. Ct. Rule 37, sec. 1 provides: "The *voir dire* examination of jurors in al cases may be conducted by the

trial judge, or he may, in his discretion ,permit such examination by the attorneys for the respective parties. If made by the judge, counsel for any of the parties desiring that additional matters be inquired into shall request the judge to interrogate the juror relative thereto, which request, if the matter be deemed material, shall be granted."

"It is indispensable to a fair trial that a litigant be given a reasonable opportunity to ascertain on the *voir dire* whether any of the jurors summoned are subject to being challenged for cause or even peremptorily." *Fedorinchik* v. *Stewart,* 289 Mich. 436, 438, 286 N.W. 673, 674. In *People* v. *Lockhart,* 342 Mich. 595, 70 N.W. 2d 802, the Michigan trial judge asked, without a request by counsel, whether the jurors had read or heard anything about the case.

6. N.H. R. S. sec. 500: 32 (1955) provides: "Any juror may be required by the court, on motion of a party in the cause to be tried, to answer upon oath whether he expects to gain or lose by the issue of the cause; whether he is related to either party; whether he has advised or assisted either party, or directly or indirectly given his opinion or has formed an opinion; whether he is sensible of any prejudice in the cause; or whether any one of the counsel in the cause is employed by him in any action then pending in said court. . . ." *State* v. *Sawtelle,* 66 N.H. 488, 530, 32 Atl. 821, 847, interprets the statute to provide for further inquiry—beyond the statutory questions.

7. R.I. G.L. sec. 9-10-14 (1956) provides: "The court shall, on motion of either party in a suit examine on oath a person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein. . . ." In *State* v. *Kieon,* R.I., 152 A. 2d 531, and *State* v. *Greene,* 74 R.I., 437, 60 A. 2d 711, e.g., counsel were permitted to examine

the jurors, the voir dire examination extending beyond the statutory questions.

8. S.C. Code sec. 38-202 (1952) provides: "The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror therein to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion or is sensible of any bias or prejudice therein. . . ." In South Carolina statutory questions and acceptable answers do not constitute a sufficient *voir dire* examination. *Brown* v. *S.H. Kress and Co.*, 170 S.C. 178, 180, 170 S.E. 142, held: "The qualification of a juror is not to be determined alone by the fact that he declares his fairness and impartiality." In *State* v. *Gidron*, 211 S.C. 360, 366, 45 S.E. 2d 587, 589, "the usual questions were propounded. . . . After this was done, the Court said: 'Now, gentlemen, is that satisfactory? If it is not, I want to give the defendant every right.'" The court upheld an examination with no additional questions, but defendant had waived his rights.

9. Utah Code sec. 77 28-1 (1953) provides: ". . . the examination of the jurors shall be conducted by the judge. The judge may permit counsel for either side to examine the jurors, but such examination by counsel shall be limited by the court." *State* v. *Gregorious*, 81 Utah 33, 16 P. 2d 893, reveals Utah's willingness to vary the voir dire examination in response to the facts of a particular case.

10. Va. Code sec. 8-199 (150) provides: "The court shall, on motion of either party in any suit, or may, of its own accord, examine on oath any person who is called as a juror therein to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein. . . ." Sec. 19-181 makes sec. 8-199 applicable to criminal proceedings. *Rust* v. *Reid*, 124 Va. 1, 20-21, 97 S.E. 324, 329, states that Virginia judges are not to rely

solely on answers to the four statutory questions: "It is not easy to see how jurors who had been intimately acquainted with the deceased for years . . . could disabuse their minds of opinions . . . and render a verdict solely on the evidence adduced at the trial. However honest they may have been in their belief that they could do so, the law does not "put them to such a test, nor subject the administration of justice to the suspicion of partiality." In *Hevener* v. *Commonwealth*, 189 Va. 802, 811, 54 S.E. 2d 893, 897, "the court gave (the juror) a searching examination," concerning what he knew about the case and what he had read. In Virginia, unlike Massachusetts, a juror's thinking himself qualified does not preclude further voir dire examination.

Appendix E

[Letterhead—Paul T. Smith]

October 20, 1964

Honorable Raymond S. Wilkins
Supreme Judicial Court
Boston, Massachusetts

RE: Commonwealth v.
Kiernan and Others
No. 13,156

Dear Mr. Chief Justice:

This is a petition for a rehearing in the above case on behalf of the appellants Francis W. Kiernan, Richard C. Simmers, and Richard K. Gordon, pursuant to the practice prescribed in *Powers* v. *Sturtevant*, 200 Mass. 519.

This petition consists of a suggestion of a point not discussed by the Court in its opinion of October 5, 1964, and not raised by the defendants in this Court or the court below. It was not raised earlier simply because it did not become relevant until after this Court overruled *Commonwealth* v. *Friedman*. 188 Mass. 308.

It is suggested to the Court that it is beyond the powers of the Commonwealth under the Constitution of the United States to punish one for a taking of property outside the territorial borders of the Commonwealth.

Perhaps the earliest expression of this principle can be found in the argument of Otis, counsel for defendant, in *Commonwealth* v. *Andrews*, 2 Mass. 14, at 15. This Court, by implication, accepted that argument in that case and in *Commonwealth* v. *Beaman*, 8 Gray 497. See also *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 440, 64 S. Ct. 208, 214; *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 50 S. Ct. 338; *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 34 S. Ct. 879.

The cases which hold that a larceny can be punished in a state other than the state in which the original asportation took place, do so on the theory that each moment that the

thief has possession of the stolen articles constitutes a new asportation. E.g., *Commonwealth* v. *Andrews*, supra, 2 Mass. at 22 (Sedgwick, J.), 23-24 (Dana, C.J.). This principle may operate only when the *identical* article stolen is the one transported into the other state. *Commonwealth* v. *Beaman*, 8 Gray 497, and cases cited; accord, *State* v. *Hedrick*, 272 Mo. 502; *Rainwater* v. *State*, 155 Miss. 684; *Grant* v. *State*, 42 Tex. Cr. 273; *Ballow* v. *State*, 42 Tex. Cr. 261, 263; 22 C.J.S., Criminal Law s. 185 (18).

The money in this case lost its identity when the $450,000.00 check was deposited in the account of the Foundation Company in the Chase Manhattan Bank in New York. Accord, *Burton* v. *United States*, 196 U.S. 283, 25 S. Ct. 243.

The Court dealt with this point only in deciding whether the defendants Simmers and Gordon could be considered principals or merely accessories after the fact. The Court ruled that the purpose of the crime was to get the funds to Brady, or to the persons designated by him, and that the defendants, having participated in the distribution of the funds, could be considered principals. (Opinion pp. 23-25.)

However, when the Court dealt with the question of where the crime took place, it decided only the question of venue. The Court did not consider whether Massachusetts had jurisdiction; only in which county venue could be laid assuming that Massachusetts *did* have jurisdiction. (Opinion, pp. 26-30.)

The case of *Commonwealth* v. *Beaman*, supra, should be controlling. In that case, the defendant was charged with larceny of a peahen and a turkey. The proof was that he stole them alive in Connecticut and was found with them dead in Massachusetts. This Court held that "the jury should have been instructed, as the defendants requested, 'that if the said fowls were alive when originally taken, from the possession of the owner in Connecticut, and were killed before being brought into this state, the defendants

could not be convicted of stealing them in this state.' " 8 Gray at 499. When the property changed in identity, the asportation ceased.

In the *Beaman* case, the Court apparently felt that for purposes of jurisdiction, the scope of the plot was irrelevant—only the places of asportation. Similarly, determining whether one was a principal or an accessory after the fact, is not relevant to the question of the Commonwealth's jurisdiction.

The crime charged was larceny. The larceny occurred in New York. The legislature could make a crime of making false pretenses with intent to defraud, and, perhaps, defendants could have been indicted for that crime. In fact, defendants were indicted and convicted of conspiracy to commit larceny. That was the sole crime within the jurisdiction of Massachusetts.

We have enclosed several copies of this letter for the convenience of the Court.

Very truly yours,

PAUL T. SMITH
MANUEL KATZ
DANIEL KLUBOCK
Attorneys for Appellants
Richard C. Simmers and
Richard K. Gordon
JOHN D. O'REILLY, JR.
Attorney for Appellant
Francis K. Kiernan

DK:le
Enclosures

SUPREME JUDICIAL COURT
BOSTON, MASSACHUSETTS

Raymond S. Wilkins
Chief Justice

October 21, 1964

Paul T. Smith, Esquire
Manuel Katz, Esquire
Daniel Klubock, Esquire
209 Washington Street
Boston, Massachusetts 02108
John D. O'Reilly, Jr., Esquire
St. Thomas More Drive
Brighton 35, Massachusetts

Dear Sirs:

Your request for rehearing in case No. 13156, *Commonwealth* v. *Kiernan*, has been received and will be considered by the full court.

Yours truly,
(s) RAYMOND S. WILKINS
Chief Justice

cc: Gael Mahony, Asst. Attorney General

SUPREME JUDICIAL COURT
BOSTON 8, MASSACHUSETTS

Raymond S. Wilkins
Chief Justice

October 27, 1964

Paul T. Smith, Esquire
Manuel Katz, Esquire
Daniel Klubock, Esquire
209 Washington Street
Boston, Massachusetts 02108
John D. O'Reilly, Jr., Esquire
St. Thomas More Drive
Brighton 35, Massachusetts

Dear Sirs:

Your request for rehearing in case No. 13156, *Commonwealth* v. *Kiernan*, has been considered by the full court and is denied.

Yours truly,
(s) R. S. WILKINS
Chief Justice

cc: Gael Mahony, Asst. Attorney General

Appendix F

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
At Boston,
October 5, 1964.

IN THE CASE OF
COMMONWEALTH
vs.
FRANCIS W. KIERNAN & others
pending in the Superior Court for the County of Suffolk

ORDERED, that the following entry be made in the docket: vis.,—

The judgments against each defendant on each indictment are affirmed.

BY THE COURT,
(s) RICHARD A. McLAUGHLIN
Clerk

October 5, 1964
A True Copy,
Attest:

(s) JAMES B. GIBBONS
Assistant Clerk, Superior Court for Criminal Business
County of Suffolk.